







A

TREATISE

ON

ESTATES AND TENURES.

BY THE LATE

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EDITED BY

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## PREFACE.

THE following Work formed a portion of the Lectures which were formerly delivered by the learned Author, in his capacity of Vinerian Professor of the Common Law of England, in the University of Oxford.

Sir Robert Chambers was the immediate successor of Sir William Blackstone in that distinguished office ; and, notwithstanding the great difficulty and disadvantage to which he could not but be exposed in following a person of so much merit and celebrity,

acquired no ordinary reputation in the discharge of its duties. With such effect, indeed, and acceptance, did he fill the professional chair, that on his appointment to a high judicial situation in India, the University of Oxford voluntarily kept unfilled for three years the professorship which he had vacated, on the supposition that the precarious state of his health might compel him within that period to throw up his appointment, and to return to England.

His own estimate, however, of the labours which the University thus valued was very moderate. It is well known to his family that, after his final retirement from the sphere of public duty, it was his wish and intention, had his life been prolonged, and had he been blessed with a sufficient measure of health for the undertaking, to write *de novo* a Commentary on the Common Law. This circumstance makes it evident that the Expositions which he had already given in

his Vinerian Lectures, however highly approved by others, did not reach the standard of fitness which he had prescribed to himself for a publication on the subject. Shortly before his death, and when the preparation of a new work had become obviously impracticable, he expressed himself in terms which left it to the discretion of his representatives to make his Lectures, or parts of them, public: but the authority was given strictly on the condition that it should not be exercised except upon the maturest deliberation.

Several years after the decease of the Author, by the kindness of those to whose care his papers were consigned, the Lectures were placed in my hands for my private use; with the permission, however, to publish all or any part of them, if such a publication appeared likely to be practically useful. Many considerations have made me feel in a peculiar degree the delicacy of the

a very important title of the English Law ; and it treats the subject in a manner to which, as I believe, no exact parallel is furnished by any other modern work. The substance of all that here appears has been shewn, since Sir Robert Chambers's death, to many eminent members of the profession of the law ; by whom, at various times, a wish has very generally been expressed that it might be rendered accessible to the Public. That wish is now complied with ; and I hope that to the legal student the Treatise will be found an acceptable introduction to the more abstruse works now in use, and that by the maturer members of the profession it will be thought to reflect no dishonour on the unquestioned powers, learning, and accuracy, of the Author.

I have only to add that the Text of the Manuscript is here published without any alteration ; and that, with the exception of

a few references to modern cases, which it was not worth while particularly to distinguish, I am personally responsible only for those annotations to which the word *Editor* is affixed.



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## INTRODUCTION.

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WHEN the Roman Empire had been thoroughly reduced under the power of one man, or, as Lucan expresses it,—

*Libertas ultra Tanaim Rhenumque recessit  
Germanum Scythicumque bonum,*

Pharsal. vii. 433.

the Roman arms, before accustomed to conquer new countries, were chiefly employed in defending their ancient territories from the attacks of nations, barbarous indeed, but possessed of that martial and free spirit which had formerly raised Rome from a nest of outlaws to the state and grandeur of mistress of the world. When the seat of its declining authority was removed to Constantinople, and men remarkable only for their weakness and wickedness were raised to the imperial dignity, the whole state was frequently convulsed by intestine divisions, and the western parts of Europe became an easy prey to ferocious invaders from the north. The Franks,

Burgundians, and Visigoths, and finally the Normans, settled in France ; the Saxons, Angles and Jutes, in England ; the Vandals, other Visigoths, and various tribes of less note, in Spain ; and in Italy, the Ostrogoths and Lombards, and afterwards a colony of Normans.

How respectable soever the memory of these nations may be for their military achievements, they did not, as far as we know, bring with them to their new settlements any considerable degree of learning, or even the use of letters. That our Saxon ancestors in particular did not is probable, since the term *Boclæden* or Book-learned men is used in the Saxon Chronicle (*a*) as a general denomination for the Romans ; in like manner as among the Arabians in the time of Mahomet, one of their clans that could write and read was called the Nation of the Book. And though some writers, desirous of deducing every thing from remote antiquity, have talked of Gothic laws derived by tradition from Zamolxis and Dicensæus, and of Saxon customs transmitted from Anacharsis the Scythian, yet certain it is that the first written laws received by any of the northern nations, and consequently their first institutions, of which we have any perfect knowledge, are those which were established among them after their migration from Scandinavia to the more southern parts of Europe ; and most of which

are composed in a barbarous kind of Latin, interspersed with uncouth terms expressing such ideas as had not yet acquired names in the Roman language.

The most ancient of these laws bear the name of *Leges Wisigothorum*, and were enacted towards the latter end of the fifth century by Euric or Euaric, king of those Visigoths that were then settled in Spain and the south-west parts of France. (*b*)

Alaric, the son of Euaric, thought more highly of the laws of Rome than of his father's institutions, and therefore employed some learned civilians in compiling from the Code and Novellæ of Theodosius and from the opinions of Roman lawyers a new code, to which he gave his own name, and which was published in the year 506. (*c*)

The successors of Alaric however either differed from him in opinion, or found the laws of a polite and extensive empire unfit for their ferocious subjects. Accordingly one of those kings before the end of the sixth century restored with alterations the laws of Euaric, to which great additions were made by succeeding princes. (*d*) But still the

(*b*) Lindenbr. Proleg. Cod. Leg. the Theodosian Code.  
Antiq. (*d*) *Ibid*.

(*c*) See Gotofred's Proleg. to

Roman principles of jurisprudence continued to have great weight; and to their influence, which appears in the laws themselves, it is perhaps owing that the laws of the Visigoths are more systematical, and written in better Latin than any of the ancient codes of the northern nations, unless perhaps we except the *edict of Theodoric*, which is next to be mentioned.

This was published very soon after the time of Euaric by Theodoric, a great and wise prince, first sole monarch of the Ostrogoths in Italy, and is I think remarkable for being skilfully suited to the exigencies and dispositions both of his Roman and Gothic subjects.

The laws of the Burgundians were compiled in the same age by Gundebald, who, according to Gregory of Tours, (e) “ *Burgundionibus leges mitiores instituit, ne Romanos opprimerent.*” Upon which passage I think it worth while to observe, that when we meet with the term *Romani* in the laws of those times, or in the histories which treat of them, we are in general to understand by it the conquered inhabitants of the different parts of Europe, who having been long subject to the government of Rome, had acquired the manner, the name, and in some measure the language, of the Romans.

(e) Lib. 2. c. 83.

The laws of the Salii, though not published in their present form till the reign and by the authority of Charlemagne in the year 798, are yet said to be in substance of greater antiquity than any of those I have mentioned, and to have been compiled as early as the year 422 by certain learned men selected by the leaders of the Franks, and afterwards to have been ratified by Pharamond.

The institutions of the Almaini, Bavarians, and Ripuarii, were enacted by various kings and leaders of these several tribes from the fifth century to the eighth. Some short collections of laws there are, which take their denominations from the Saxones, Angli, Thuringi, and others, the authors of which are not certainly known, but which are now generally believed to have been compiled before the time of Charlemagne. The laws of the Lombards are of various antiquity: but the greatest part of them were compiled in the seventh century by their first legislator King Rotharis with the consent of an assembly of chieftains (whom modern writers in compliance with modern notions have called barons,) without any intermixture of the clergy or commons. (*f*)

These with the capitularies of Charlemagne and Ludovicus Pius are so many of the laws collected by Lindenbrogue in his *Codex Legum Antiquarum*

(*f*) Giann. Hist. Naples. B. 4. l. pt. xi. p. 1—181.  
c. 6. Script. Rer. Italic. tom.

as were promulgated before the coming of the Normans into England; and are indeed almost all the laws of the Gothic and Teutonic nations that I know of antecedent to that period, excepting a collection of Spanish laws intituled *Fuero Jusgo*, upon which the learned Mr. Barrington has made many curious remarks in his observations on our ancient statutes. Some fragments of Gothic laws are also mentioned by Stiernhook in his treatise *De Jure Sueonum et Gothorum vetusto*, (g) which seem to have been originally written in different northern dialects, chiefly for the use of very limited jurisdictions, and not earlier than the ninth, or as Stiernhook thinks the tenth century. Lastly, those Saxon laws may perhaps be considered another exception which formerly prevailed and still are said to have some authority in the northern parts of Germany, (h) consisting partly of the customs of Magdeburgh composed in the ancient dialect of Saxony, and reduced into writing in the tenth century by the command of Otho the Great, and partly of those written in the Latin tongue and contained in the *Speculum Saxonicum* which was compiled as some authors tell us in the tenth, but according to others not till the thirteenth century. (i)

The perusal of these laws will easily discover

(g) Lib. 1. c. 1.

(h) Duck. de usu J. Civ. lib.

2. c. 2. s. 14.

(i) Duck. de usu J. Civ. lib.

2. c. 2. s. 12. compared with  
Stiernhook, de J. Suen. vetus-  
to, lib. 1. c. 1. p. 6.

them to be the institutes of kindred nations governed by the same original constitution, and carrying on the same general system of civil life.

*Facies non omnibus una  
Nec diversa tamen, qualem decet esse sororum.*

Great similarity and conformity may be observed between all the most ancient of them, and those of our Saxon and Danish kings; and in the laws of our Henry the First, who professed to revive the Saxon constitution, the laws of the *Salii* and *Ripuarii*, particularly of the *Salii*, are frequently quoted by name, and sometimes transcribed without being named. (*k*) Their general character is this, that being formed for nations, in which private quiet was more endangered by violence than subtilty, they have chiefly endeavoured to restrain crimes, and have made very few provisions for ascertaining property, or deciding disputes. It may be supposed that when these invaders first occupied the lands of conquered nations according to a distribution publicly made, while every man's title was recent it was undisputed, and that for some time whoever desired more than he had found it easier to take it from an old inhabitant than a fellow-soldier. By degrees however military violence began to subside, and the stranger coalesced into one system of government with the original people. At this time, or

(*k*) Spelm. Cod. Vet. Leg. published at the end of Wilkins's Ll. Anglo-Sax.



rather as this time was advancing, it became necessary to protect the Romans from the outrages of their conquerors, and therefore many laws were made *ne fortior omnia posset*. By degrees as they had no enemies to oppose, they would naturally form claims upon one another, and as intermarriages diffused relationship, the order of inheritance would become perplexed. We may then reasonably suppose that the rules of descent were first reduced into regular subordination, and in the decrees of Emperors registered in the later laws of the Lombards may plainly be discovered the first rudiments of feudal tenures.

The duration of the feudal law has by some writers been fancifully enough distinguished into four ages. (*l*)

In its infancy, the lands given to the soldiers which were not yet called feuds, and perhaps had no general denomination, were held by the mere will and pleasure of their lord. A will so frequently and so capriciously changed that the first improvement of the feudal state was made by converting this arbitrary tenure into a possession certain for a year. This small improvement most probably took its rise from a rule deeply founded in equity, that he who sows is entitled to reap. The same kind of possession was afterwards extended

(*l*) Craig. de J. Feud. 31.

to the life of the tenant: but at his death it devolved again into the hands of the lord, and was by him arbitrarily granted to some other favourite. This is the first age of the feudal law, of which the beginning is uncertain, and which is supposed to end about the middle of the seventh century, in the time of Rotharis the legislator of the Lombards, and nearly one hundred years after the coronation of Ethelbert our first Anglo-Saxon law-giver.

The second age began, when some regard was had to descent. It is supposed, that at first the son of a tenant was put into possession of his father's lands, not as having a better right, but as being naturally more known and more favoured than a stranger. What was reasonable by degrees became customary, and when the son without any cause alleged was excluded, the lord was considered as exercising *summum jus*, as acting unkindly, though not illegally. In time the advantages of a more certain settlement were discovered, and grants were made to a tenant and his sons. These grants were however interpreted in their most literal rigour. That which was granted to the sons did not descend to the grandsons, and when the sons, as was then the custom, had divided the inheritance into equal parts, if any of them died, his part neither descended to his children, nor was shared among his brothers, but fell back to the disposal of the lord. Then was established

a rule of the feudal law, that a donor shall not be presumed to intend more than he expresses. *Donationes sunt stricti juris ne quis plus donasse præsumatur, quam in donatione expresserit. (m)* This is the second age of the feudal law, which ends about the year 800, in the time of the Emperor Charlemagne, who is said first to have carried the doctrine of feuds from Lombardy into France.

In the third age those possessions which, while they were granted only for life, or at most with very strict limitations, had been termed *beneficia*, began to be made indefinitely inheritable, and took the name of feuds. The succession to a feud was for some time strictly lineal. If there was no heir of the body of the tenant, the feud reverted to the lord. Collateral inheritance was first admitted by the Emperor Conrad the Second, (n) who in his journey to Rome granted to his soldiers, that the feuds of those who should die in the expedition might, for want of direct heirs, pass to collateral relations, on a condition, which the feudal law never relaxes, that they were descended from the first feudatory. This privilege could not therefore be extended to possessions acquired by the present tenant, which were called *feuda nova*, and distinguished from *feuda paterna et antiqua*. This law, of which an abridgment only is inserted in

(m) Craig. de J. Feud. lib. 1. tit. 9. s. 33.

(n) Feud. lib. 1. tit. 1. Cuj. Comm. vol. ii. p. 799.

the book *De Feudis* hereafter to be mentioned, is to be found at large in the laws of the Lombards, as published by Lindenbrogue. (o) During the third age of feuds, and about the end of the ninth century, the feudal doctrine of tenure seems to have been introduced into Normandy, from whence it was afterwards derived to us; for at that time it was that Rollo, the leader of a confederate army of Normans, that is, of Danes, Swedes, and Norwegians, received from Charles, king of France, the province of Neustria, thenceforth called Normandy, to be held as a feudal dukedom, and submitted in return, though with reluctance, to make the feudal acknowledgment of homage. (p) This age ends with the Emperor Conrad's expedition to Rome in the beginning of the eleventh century.

The three periods of the feudal law which have been mentioned are called its infancy, childhood, and youth. Then commenced its fourth age or maturity: the order of descent was settled, collateral relations were admitted to inheritance, the reciprocal obligations of lord and tenant were fully understood, and some princes, the first of whom was the Emperor Conrad the Second, had published edicts in writing for regulating feudal successions. (q) But no code of feudal law had yet been digested, by which any deviation from right

(o) Lib. 3. tit. 2. l. 4.

(p) Hume's Hist. Engl. c. 3.

(q) Feud. lib. passim.

might be rectified, or to which either lord or tenant might appeal. In this crisis happened that great revolution commonly called the Norman Conquest, soon after which the feudal law was established amongst us with complete prevalence.

The question, which has been so much agitated, whether feuds were in England before the Conquest, may be differently decided according to the different meanings affixed to the term "feuds." It is certain that the Saxon constitution was of that kind which may be called a feudal government in its early state; and it is very probable at least that the terms earl, king's thane, middle thane, and ceorl, corresponded in some measure to those of count, baron, vavasor, and villain, among the Normans, since these French terms are used as explanatory of the Saxon ones beforementioned by William the Conqueror in his republication of the laws of Edward the Confessor. (r) But on the other hand there is great reason to believe, that earldoms and other dignities were merely temporary offices like that of lord lieutenant at present, or at most for life, and that however thanes might be deemed to hold their lands, the wardship of infant tenants, the sale of their marriages, and the other fruits, as they were called, of our English feudal tenure, were not introduced till some time

(r) Spelm. on Feuds, c. 8. and Seld. Tit. Hon. 613.

after William's accession, and then only on pretence that they were legal consequences of the 52d and 58th laws of his code, whereby it was enacted that all the freemen of the land should become his men and do him homage. Indeed, among the Northern nations all titles were mere names of office, since they had not any honorary distinctions corresponding to the *Vacantes*, *Honorarii*, and others, among the Romans, or to titles of honour among the modern nations of Europe. (s)

About a century after the conquest the feudal law received its completion by the book *De Feudis* now appended to the body of the civil law, and compiled in the time of Frederic the first. This book comprises some decretal epistles of popes and some edicts of emperors, with the opinions and decisions of feudal lawyers, particularly of those from whose collections it was chiefly compiled, Gerardus Niger and Obertus de Horto. This was the highest state of the feudal law, in which like all other human things it continued a short time, and from which it afterwards declined.

The subject matter of the juridical system, of which I have thus endeavoured to trace the history, is that species of gift or that species of property, which is denoted by the term "feud" or "fee." For though by "feud" is originally and

(s) Grotius, Proleg. to Hist. of the Goths.

properly meant a grant, yet the word is frequently used to express the estate granted. In like manner as in our Saxon laws the term *laga*, which strictly signifies law, is sometimes used for the region within which law operates ; and so by the word *district*, which originally meant jurisdiction, or the power of distraining, is understood the territory over which that power extends. But this distinction is not very important ; since if the nature of the grant be explained, the estate granted, or in other words the interest of the grantee, must be understood.

A feud or fee is a free grant of something immoveable, generally of lands, made to any person in such a manner, that the sovereign right over the thing granted still remains in the hands of the donor ; but the profits arising from it are so consigned to the grantee as to pass to him and from him for ever to his heirs, where heirs are mentioned : in consequence of which he and his heirs are bound to maintain true fealty to the lord, either by some service expressly particularised, or by the general duties of fidelity and allegiance.

It is evident from this definition, First, that as in every feudal donation the sovereign property remains in the donor, and the beneficial property passes to the donee, the donor continues to be lord of the property granted ; the grantee is only the tenant or holder of it.

Secondly, that in every feudal tenure some service or acknowledgment, and at least the general one of fidelity, is due from every tenant to his lord.

So necessary are these two conditions to the very existence of a feud, that no possession can in any sense be feudal unless there be a lord, who is considered as the ultimate proprietor to whom the estate may in some events revert, and a tenant or vassal who may be compelled to do homage or take an oath of fealty to the lord. All the other qualities of a feud may be varied by the tenor or express terms of the grant: and hence arises the division into proper and improper feuds, those only being proper feuds which agree exactly with the definition; those improper, which want any character therein expressed or understood.

In the endless variety of claims and jurisdictions; which, after all the reformation of our law, still remain amongst us, there is sufficient evidence that the feudal system in its subordinate parts and particular tenures complied very freely with custom, with caprice, with private passions, or private convenience. As all these are causes uncertain in their operations, their effects admit of no regular distribution; many claims admitted and now admit of no other proof than custom or prescription, and suits could be decided only by the evidence of old writings or old inhabitants: but the great and essential parts having their foundation on solid prin-



ciples, grew up into stated rules and regular practice. These may be reduced to a few heads, which will afford a comprehensive view of feudal tenure.

First, In proper feuds the service to which the tenant was bound was uncertain, for it was to assist his lord by his counsel and his sword, whenever occasion should require. (*t*)

Secondly, In case of the tenant's eviction, that is, in case he was deprived either by force or law of the land, which the lord had granted him, the lord was bound either to give lands of equal value, or to make him satisfaction in money. (*u*) Craig and Sir Martin Wright doubt whether this rule subsisted *ab origine*, because they think it could not reasonably prevail when feuds were gratuitous: but ancient writers and the book of feuds (*x*) itself make no difference between proper feuds gratuitously given, and such as were bought and sold; nor does it seem unreasonable, that if the tenant were always ready to defend his lord, the lord should in return protect his possession.

Thirdly, In proper feuds women, being unable to perform the services, were incapable of inheriting: for which reason the word "heirs" in such feuds must be understood to mean "heirs male."

(*t*) Craig. lib. 1. tit. 9. Zasius Examen J. Feud. c. 24. q. 23.  
de Jur. Feud. 114. (*x*) L. 2. t. 80.

(*u*) Feud. l. 2. t. 8. Strykii

Monks laboured under a similar disability, and for the same reason.

Fourthly, In proper feuds, the word "heirs" in the grant is to be construed to mean such heirs only as were descended from the first grantee: so that on the death of any tenant without issue such collateral kinsman only could inherit as was lineally descended from the first feudal possessor.

Fifthly, In the original creation of proper feuds it is to be presumed, that the lord when he granted away the profits retained not only the ultimate property, but his jurisdiction likewise over the estate granted and over his tenant in virtue thereof.

Sixthly, Every feud was presumed to be a proper one, till the contrary appeared either from the words of the grant, according to the maxim *tenor dat legem feudo*, or from the custom of the country. And except in such qualities as were changed by either of these causes, improper feuds retained the nature of proper ones.

Seventhly, Investiture, or the solemnity whereby the tenant was put personally into possession of his feud, was equally necessary in proper and improper feuds. But the fruits and consequences of feudal tenure differed in all the different countries of Europe.

Eighthly, The rules of the feudal law are not to be applied to any thing but feudal property, and therefore not to moveable property, or to lands that are free from all tenure in countries where any lands are so.

It is evident from what has been said that our estates in England have all something of the nature of feuds, and formerly partook much more of it. But the difference between proper and improper feuds had little influence upon the general constitution. This kingdom, like almost all other European nations, was for some centuries after the conquest regulated by the feudal subordination, and consequently governed by the feudal law, by which the king is considered as sovereign proprietor of all feudal lands, and by consequence of all lands in this kingdom. He could give lands in different quantities, and upon different conditions. And for the same reason that he distributed lands to others he retained large districts to himself, that he might be supported according to the superior dignity of his station, and of those which he granted away he retained the supreme dominion.

## CHAPTER I.

### OF FEE SIMPLE.

THE nations which overran the Roman empire satisfied themselves with very little legislation. They were nice in appreciating crimes ; and they established such laws concerning the distribution of lands and succession to them, as their situation and the form of their government almost necessarily required : but with respect to moveable property and personal injuries not amounting to crimes they were frequently content to use such laws as they found already prevalent among the conquered inhabitants of each country. Hence the great weight which the civil law has retained in most of the countries of Europe ; and hence arises the difference which is so remarkable between personal and real property in England. Our rules respecting real property are almost all feudal ; those which concern personal estate are derived either from the law of nature or from the civil law.

Real property consists of lands, tenements, and hereditaments, of which the second includes the first, and the third the two former.

By the term "land" is to be understood not only the ground itself, but every thing which either art or nature has fixed upon it, according to the rule mentioned by Sir Edward Coke,—*cujus est solum ejus est usque ad cælum*. (a) And it is therefore not prudent to omit it in the transfer of any fixed and immoveable property ; for though by the conveyance of a wood or a house, the land on which the wood grows or the house stands will pass, yet nothing can be thereby conveyed but what comes strictly within the description of the deed, or is necessarily implied ; whereas if I give a man so many acres of land, all the woods, houses and waters, that are thereon, and every thing else that is either attached to the soil or can be said to belong to it, will pass therewith of course.

Tenement is a larger term, including, according to Sir Edward Coke's explanation, not only all corporeal inheritances, which are or may be holden, but also all inheritances issuing out of corporeal inheritances, or concerning or annexed to or exerciseable within the same : such as rents issuing out of lands, rights of common, offices or dignities which any way relate to lands or to certain places. (b)

Lastly, hereditaments, says Coke, is the largest word of all, for whatever may be inherited is an

(a) Co. Litt. 4.

(b) Co. Litt. 19, 20.

hereditament be it corporeal or incorporeal, real, personal, or mixed. (c) As moveable property does not according to our law go to the feudal representative or heir but to the executor appointed by will, or to the administrator admitted by the ecclesiastical judge, nothing of that kind can be called an hereditament; and it is therefore not very easy to find an instance of an hereditament which is not a tenement. Some however there are; any office or dignity merely personal granted by the king to a man and his heirs without any local relation is an hereditament, and yet does not seem to come within the description of either of the former terms. The dignity of an earl has been determined to be a tenement, because it relates to the earldom. (d) But the title of baronet, though certainly an hereditament, does not appear to be a tenement, because it has no relation to land.

The first thing to be considered with regard to this species of property is the estate which a man may have therein, that is, the quantity of his interest, property or dominion, for it must be carefully remembered that the term "estate" does not legally signify the land or hereditament itself, but the right of inheritance or other less interest therein, which the owner of that land enjoys. (e)

(c) Co. Litt. 6. a.

(e) Co. Litt. 345.

(d) See Nevil's case, 7 Rep. 33.

Real estates then are of three kinds: a freehold, a chattel real, and a customary estate.

Freeholds are either of inheritance or mere freeholds. Freeholds of inheritance are divided into fee simple and fee tail. And a mere freehold which endures no longer than for life is of four sorts: first, that which is called an estate tail after possibility of issue extinct; secondly, that which has the name of an estate by the curtesy of England; thirdly, that which is enjoyed by her who is tenant in dower; and, fourthly, an estate for life strictly so called.

A chattel real, which is the second species of estates, is either, first, a lease for years; or, secondly, a tenancy at will.

A customary estate, which is the third, is either by copy of court roll, commonly called a copyhold, or by the verge, which indeed is only another kind of copyhold.

This distribution of estates is an analysis of Littleton's tenures, a treatise to which in the opinion of Camden and Lord Coke the students of the common law are no less beholden, than the civilians to Justinian's Institutes. (*f*) I apprehend therefore that I cannot by any method communicate more

easily and efficaciously a general idea of the nature of estates, than by a brief and elementary comment on Littleton's first book ; which appears to have been intended by him as an introduction to a very small but ancient work written in Norman French, intituled *Old Tenures*, upon which he enlarges in his second book, and which is said to have been composed in the reign of Edward the third, that is to say, about a century before our author, who flourished in the reign of Edward the fourth. (g)

Littleton's first section is as follows :—

#### SECT. 1.

*Tenant in fee simple is he which hath lands or tenements to hold to him and his heires for ever. And it is called in Latin feodum simplex, for feodum is the same that inheritance is, and simplex is as much as to say lawful or pure. And so feodum simplex signifies a lawful or pure inheritance. Quia feodum idem est quo hæreditas et simplex idem est quod legitimum vel purum. Et sic feodum simplex idem est quod hæreditas legitima vel hæreditas pura. For if a man would purchase lands or tenements in fee simple it behoveth him to have these words in his purchase, to have and to hold to him and to his heires: for these words (his heires) make the estate of inheritance. For if a*



*man purchase lands to have and to hold to him for ever ; or by these words, to have and to hold to him and his assignes for ever : in these two cases he hath but an estate for term of life, for that there lack these words (his heires), which words only make an estate of inheritance in all feoffments and grants.*

Fee, *feodum* or *feudum* is always used by writers on the feudal law to denote either the grant or the thing granted. As it signifies a grant, I have formerly given a description of it almost literally translated from the book of feuds. (*h*) As it denotes the thing granted, a feud is more shortly defined by Gilbert, “ a right that a vassal has in lands, or some immoveable thing of his lords to take the profits, paying the feudal duties.” (*i*)

As it appears from both these definitions, that in every feudal donation the *dominium directum*, to borrow an expression from the Civilians, or sovereign authority, remains with the donor, and only the *dominium utile*, or as some of the feudalists express it the *jus utendi prædio alieno*, passes to the donee, it necessarily follows that the grantor continues to be lord of the fee, the grantee is only the tenant or holder of it. And as in consequence of the general introduction of feudal tenures by William the Conqueror it is by a legal fiction supposed

(*h*) Feud. lib. 2. t. 23. in fine.

(*i*) Gilb. Ten. 1.

that all the lands in England, which are possessed by subjects, have been bestowed by the king; for this reason the king is considered as the ultimate owner and supreme lord, and every other proprietor is with respect to him called a tenant.

But as it likewise appears from these definitions, that the word "fee" properly and originally denotes only the quality or condition of tenure, not the quantity or duration of the estate, it cannot but seem strange at first sight, that Littleton should consider *feodum* as synonymous with *hæreditas*; and accordingly Sir Thomas Smith, in his Commonwealth, Book III. c. 10. condemns him for giving a sense to the word which "it doth not betoken in any language."

In order to explain and account for this, it is necessary to recollect that during the ninth and tenth centuries those military possessions which before had been seldom, if ever, granted for any longer time than for life, began in most of the Gothic nations to be generally inheritable; that they were universally so in Normandy, when feudal tenures were introduced among us; and that though *beneficium* and *feodum* were sometimes used as synonymous, yet that in the opinion of many learned writers *beneficium* meant properly an estate for life (as it still does with respect to ecclesiastical possessions), and *feodum* a military estate of inheritance; whence Mr. Sumner, observ-

ing that *feudum* was a term not known till about the year 1000, says somewhat quaintly that *beneficium* was *feudum*'s elder brother. (k) This being the case, *feodum* or *feudum* may with sufficient propriety be used not only in its primary signification as opposed to "*allodium*," which means real property not holden of any superior ; but likewise in its secondary sense in opposition to any estate, which does not descend to the heir of the possessor. Now it having been for many ages a fixed and undeniable principle or axiom of the law of tenures, that all the lands in England are holden mediately or immediately of the crown, our English lawyers (especially of late years) very rarely have any occasion to use the word fee in contradistinction to *allodium*, to denote the tenure or quality of any man's estate : but generally use it to express the continuance or quantity of estate. And this is clearly the sense and import of it in the form of pleading an inheritance in the king, when we say that he is seised in fee, or in his demesne as of fee, which expression cannot possibly import a tenure or tenancy ; because, as Coke observes, a tenant holdeth of some superior, and the king hath no superior but God : it can therefore mean nothing but simply an inheritance, without regard to the *dominium*, property, or tenure. So likewise in speaking of copyholds, which, as we shall see hereafter, never were held by military

(k) Summ. on Gavelk. 102. See also Spelm. on Feuds, c. 2.

services, but on the contrary by those of the basest nature, we say of a copyholder of inheritance, that he is seised in fee, though according to the notions of our martial ancestors his interest is as much below that of a truly feudal tenant as the king's estate is above it.

In conveying or conferring these fees, or estates in fee, which contrary to the original purity of proper feuds are become vendible, the old form of donation is still preserved, and a deed of feoffment, which is the most ancient and proper form of conveying an estate in fee simple, retains at this day the form of a gift. It is perfected and notified by the same solemnity of livery and seisin, or investiture, as I have formerly shewn that a pure feudal donation was, and it is still directed and governed by the same rules; insomuch that the principal rule relating to the extent and effect of a feudal donation *tenor dat legem feudo* is in other words become a maxim of our law relating to feoffments: *modus dat legem donationi*. In feoffments too, as in pure feudal donations, the giver or superior from whom the feud or fee moves must expressly limit and declare the continuance or quantity of the estate he means to confer, or else the feoffee or donee shall have an estate for life only; for feoffments are still so far to be considered as gifts, that they are not to be extended beyond the express limitation or manifest intention of the feoffor. (l)

(l) See ante, Craig. de Jure, Feod. 50.

These principles may account satisfactorily for the rigour of the rule delivered in this section by Littleton, that the word "heirs" is absolutely necessary to constitute an estate of inheritance, so that no synonymous term, no equivalent periphrasis or circumlocution, will have that effect, how clear soever the intention of the parties may be.

Littleton's expression is, that these words ("his heires") make the estate of inheritance in all feoffments and grants. The reason why he mentions feoffments and grants is that a deed of feoffment is the most proper, and was anciently the only instrument for conveying an estate in fee simple of lands, houses, and other corporeal inheritances; and a grant is that species of deed by which we convey such inheritances, as being in themselves incorporeal do not admit of actual delivery: such as advowsons, commons, and the like. The rule however extends, as Lord Coke informs us in his comment on this passage, to most other kinds of conveyance as well as to feoffments and grants; though at the same time he tells us that there are many exceptions to it which he particularly enumerates, and of which I shall select some of the most usual and important.

A fee then may pass without the word "heirs."

- 1. By any devise of lands in a last will and testa-

ment, where the intent of the devisor is sufficiently clear and express; for wills (*m*) not being of feudal origin are not subject to the rules of

(*m*) A devise in a general sense means the gift of a man in his lifetime to be completed after his death, by the acceptance of the donee. But the term *devise*, though sometimes used for any testamentary bequest either of lands or goods, signifies in its strict and proper sense a disposition of freehold property by will, as bequest or legacy does a disposition of personal property whether consisting of chattels real or personal.

A will or testament is well defined by Grotius to be “an alienation in case of death, revocable at any time during the life of the testator, the right of possession and the use being retained by him *alienatio in mortis eventum ante eam revocabilis retento interim jure possidendi ac fruendi*. (1)

Hence may be collected a more circumstantial definition of a devise; that it is “an alienation of freehold property to take effect at the death of the devisor, but which may be revoked by him at any time during his life.

The feudal law, which prohibited all alienations of lands and tenements without the consent of the lord and of the next collateral heir, *a fortiori* prohibited this species of disposition which seems to imply a more full and complete dominion over the property devised than any other kind of transfer. In England this restraint continued with respect to wills long after alienation by deed had ceased to be unlawful. It still continues in Scotland where lands cannot be devised by will; and an ingenious writer of that country observes, that “this law of death-bed was in England, and now is in Scotland, the last relic of the ancient bar against alienation.” (2) But though the legal possession of land could not be devised, yet the owner might by will give another a right to receive the profits of his lands by means of a contrivance which was called a use; (3) and which is said to have been invented by ecclesiastical bodies for the purpose of evading those ancient statutes called the statutes of mortmain, which prohibited the alienation of lands

(1) Grot. de Jure B. et Pac. lib. 2. c. 6.  
c. 3. Prop. s. 1.

(2) Dalrymple on Feud.  
(3) Lord Dacre's case, 27 Hen. VIII. 7. b.

law which are derived from that source, and it is a maxim that the intention of the parties is to be observed in interpreting them as far as is con-

unless by the licence of the king, and that of the mesne lord, if any, to any body corporate. By a devise to uses it was understood, that the legal estate was vested in one person, and a trust was also reposed in him and all persons claiming under him to permit another to receive the profits, and direct the disposition of the estate. (4) Of such a trust the courts of law would take no notice; but the chancellor, who was usually an ecclesiastic, held it to be binding on the conscience of him who had the legal estate; and therefore if Caius gave his estate to Titius to the use of such ecclesiastical corporation, or to the use of Sempronius and his heirs, or to the use of such person as the donor should appoint by will; in all these cases Titius might be compelled to execute the intention of the donor. Afterwards on account of the many inconveniences which uses were found to occasion, and which had been found incapable of remedy by previous statutes, an act was passed in the 27th year of Hen. VIII. (stat. 27 Hen. VIII. c. 10.) commonly

called the Statute of Uses, which recites that by the common law lands were not devisable by will, and enacts that for the future he who shall be entitled to the use of any lands shall be deemed to all intents and purposes to be in the possession of the lands themselves. The consequence was, that the use was extinguished as far as respected its equitable nature, an use in consideration of law being the very possession of the lands conveyed; and it was therefore held that thenceforward uses could no longer be devised, since a devise of the use amounted to a devise of the land itself. (5) But the nation, which had long enjoyed the privilege of leaving the profits of their land under the name of an use, grew uneasy under this restrictive alteration, and it was therefore soon after enacted by the stat. 32 Hen. VIII. c. 1., usually called the Statute of Wills., that every tenant in fee-simple of socage lands might dispose thereof by will, and by the stat. 34 & 35 Hen. VIII. c. 5. this power was extended to two third parts of lands held by

(4) Gilb. Uses, p. 1.

(5) Gilb. Devises, 11.

sistent with the rules of law. To which may be added, that a will is construed the more favourably, because it is often made at a time when it may be presumed that the testator is *inops consilii*. If therefore land be devised to A. for ever, or to him in fee simple, or to him *et sanguini suo*, these all give a fee simple: but a devise to him and his assigns, without the words "for ever," gives an estate for life only.

2. A fee simple may be conveyed without the word "heirs" by creation of nobility by writ; which of itself ennobles the blood to a man and his heirs lineal, unless the writ limit it to the heirs male, &c. But creation of nobility by patent, which is of late generally used, gives no inheritance without proper words. (*n*)

knight-service. All freehold estates of inheritance being now reduced to holding by socage tenure, every owner of freehold lands or tenements may now dispose of them by will in any way he pleases.

(*n*) The history of the baronial dignity is divided by antiquaries into three periods, of which the first extends from the Conquest to the latter time of King John. The second from King John to the middle of the reign of Richard the Se-

cond. And the third from Richard the Second to the present time.

During the first period, all barons were barons by tenure, created by the King's charter, granting them possessions with a reservation to himself of honorary or military services. Every barony had a castle or chief seat called *caput baroniæ* (Spelm. Gloss. Tit. Baro. p. 82. Mad. Bar. Angl. B. 1. c. 1. p. 17). What quantity of possession, or whether any certain quantity,



3. In gifts that take effect by reference ; as if A. gives land to B. and his heirs, and then B. enfeoffs A. as fully as A. had before enfeoffed him.

constituted a barony is not yet ascertained. The opinion of Spelman, (Gloss. 80.) and of Sir Edw. Coke (2 Inst. 7.) with whom most writers concur, is that an earldom, the only other dignity known to our ancient constitution, comprised twenty knights' fees, and a barony thirteen and a third part. This is founded upon the authority of a book called *Modus Tenendi Parliamentum*, which is yet unpublished and of great antiquity, though certainly less ancient than some have thought it.

In this state the baronage is supposed to have remained till the latter end of the reign of King John; when a distinction being made between *barones majores* and other immediate tenants of the crown, or as they were called tenants *in capite*, it was agreed that the greater barons should be particularly summoned to parliament by the king's writ, and the rest generally by the sheriff of the county. *Faciemus summoneri Archiepiscopos, Episcopos, Abbates, Comites et majores Barones regni sigillatim per literas nostras; et præterea faciemus summoneri generaliter per vicecomites et*

*ballivos nostros omnes alios, qui in capite tenent de nobis ad certum diem.*—King John's Great Charter.

From this time commenced barony by writ, of which neither the cause nor the effect is certainly known. By what rule the greater barons were distinguished, and when the distinction was first made, whether the barons so denominated were already known, or whether it was in the king's power to determine who should be called great, has not yet been certainly discovered. Camden tells us from an author as he says of sufficient antiquity, "*quod omnes Comites et Barones regni Angliæ quibus ipse Rex dignatus est breviam summonitionis dirigere, venirent ad parliamentum suum et non alii nisi forte Dominus Rex similia breviam eis dirigere voluisset* (Camd. Brit. 122). But this does not shew the state of things in King John's time, nor is the name of the author told us, nor has the passage been seen by any other inquirer. Selden's observation too, that he extends to *comites* what could be true only of *barones*, takes away his credit whoever he may be.

As the word “successors” with respect to corporations corresponds to the word “heirs,” it is the proper term to be used in gifts to such bodies; and in every conveyance of a fee simple or perpetual estate to a bishop, rector, or any corporation sole but the king, it is as necessary as the word “heirs” in a grant to a private person. In

This passage, however, together with other considerations, makes it probable that the first effect of writs was not creation but exclusion; that those to whom writs were sent were barons by tenure before, but that a barony by tenure was no longer considered as conferring a seat in parliament without a special writ. In the state of those dark ages we have not sufficient knowledge to enable us to determine the motives of either king or barons. To attend the parliament was one of the services by which a barony was held, a service of which perhaps many thought the burthen greater than the honour, and were therefore gratified by an exemption, which enabled them to hold the lands, and relaxed the condition of their tenure.

From this time barons are supposed to have been of two kinds, barons by writ and tenure, and barons by writ only. The power of excluding those

who were not summoned by writ soon deviated by an easy change into the power of admitting all to whom writs should be directed, whether they had or had not any other title to a seat in parliament. By what principle of choice those writs were sent, where there was no baronial tenure, or whether a tenure *in capite* was always required, is like many other questions relating to that period undetermined.

To the call or summons of new barons by writ, which perhaps supposed either a dormant barony or a baronial tenure, that is, a tenure *in capite*, succeeded in the eleventh year of Richard the Second creation by patent; in which no other claim to a seat in parliament was pretended or professed but the pleasure of the king; from which time nobility became a mere emanation from the crown, effused or withheld at the pleasure of the sovereign.

gifts to the king and to corporations aggregate neither the word “successors,” nor “heirs,” nor any other word of perpetuity, is requisite, because they never die.

## SECT. 2.

*And if a man purchase land in fee simple, and die without issue, he which is his next cousin collateral of the whole blood, how farre soever he be from him in degree, may inherite and have the land as heire to him.*

Littleton having in his first section shewn what a fee simple is, and how it is conveyed or conferred, proceeds now to regulate the descent of it on the death of him to whom it was given, who is called the purchaser, that is, the acquirer: for the term purchase in law has no relation to buying and selling, but includes every method of coming to an estate except descent.

I shall endeavour from this and the following sections, as well as from Lord Coke's comment upon them, to draw a few rules or maxims concerning this subject, which may perhaps recommend themselves to memory as well by their brevity as their importance.

Cousin, or *consanguineus*,\* means kinsman in general; and consequently includes brothers and

sisters, as well as those whom we usually call cousins. The rule therefore here delivered amounts to this:—"that failing lineal descendants of the purchaser the estate at his death shall go to his next collateral kinsman," *i. e.* "to the lineal heir of his nearest ancestor, of his father, if his father left any other child ; otherwise of his grandfather, and so on."

The reason of this, as of all our rules relating to this subject, may be discovered in the feudal law. The succession to a feud, when feuds first became hereditary, was strictly lineal ; if there was no heir of the body of the tenant, the feud reverted to the lord. When collateral inheritance was admitted, it was nevertheless admitted on the condition that such collateral relations should be descended from the first feudatory. (*o*) This privilege therefore was necessarily confined to *feuda antiqua*, feuds that had descended to the vassal so dying without issue, and could not extend to possessions acquired by himself, which were called *feuda nova*. (*p*) In process of time however it became usual, when a feud reverted to the lord for want of heirs or any other cause, to grant it out again *ut feudum antiquum*, and then the descents were formed in such new feud as if it had really been *feudum antiquum*. "*Moribus receptum est*,"

(*o*) Feud. lib. 1. tit. 1.

(*p*) Stryk. Ex. Jur. Feud. cap. 16. q. 4 and 5.

says Zasius, “ *quod feudum novum antiqui feudi jure concedi possit et antiqui naturam assumat.*” (q) The consequence of this was that if the vassal to whom a feud was so granted died without issue, his next collateral kinsman succeeded as heir to him (to use Littleton’s phrase) “how far soever he might be from him in degree.” For the necessity of recurring to the blood of the first feudatory could not but cease, when the antiquity of the feud itself was entirely a fiction, and there never really had been any such feudatory. With us, from the very first introduction of tenures, every conveyance of the fee simple seems to have been considered as a grant of this kind, a grant of a *feudum novum* to be held *ut feudum antiquum*.

It must be further observed that “the next cousin collateral” who is to inherit must be next, as Coke expresses it, not merely *jure propinquitatis*, but *jure repræsentationis*; for it is a rule “that lineal descendants *in infinitum* represent their deceased ancestor, and are invested with his rights.” If, therefore, John Styles has two brothers Richard and William, and Richard the elder brother dies in the lifetime of John leaving a son; now if John die seised of an estate in land in fee simple without issue, although his brother William is naturally nearer to him than his nephew, yet as the nephew represents his father Richard the elder

brother, he shall take the inheritance in preference to his uncle William.

### SECT. 3.

*But if there be father and son, and the father hath a brother that is uncle to the son, and the son purchase land in fee simple and die without issue leaving his father, the uncle shall have the land as heir to the son, and not the father, yet the father is nearer in blood; because it is a maxim in law that inheritance may lineally descend but not ascend. Yet if the son in this case die without issue, and his uncle enter into the land as heir to the sonne (as by law he ought) and after the uncle dieth without issue living the father, the father shall have the land as heir to the uncle, and not as heir to the sonne, for that he cometh to the land by collateral descent and not by lineal ascent.*

The rule in this section, “that inheritance may lineally descend, but not lineally ascend,” is also literally feudal:—*Successionis feudi talis est natura quod ascendentes non succedunt, verbi gratiâ, pater filio.* (r) And the reason is not difficult to investigate; for if the feud was really what the feudists called *antiquum aut paternum*, the father could not succeed to it, because it must have passed him before it could possibly have come to the son.

(r) Feud. lib. 2. tit. 50.

And if a feud was newly and originally given to the son *ut feudum antiquum*, such feud did in all respects descend as if it had been an ancient or paternal feud, which must, as I have said before, have passed the father before it could have come to the son. So that in this case likewise the father was excluded. On the other hand, if the feud was strictly speaking *novum*, that is to say, newly purchased by the son, and not granted to him *ut feudum antiquum*, it could only descend to his children; and if he had no children, it could neither ascend to the father nor incline to any collateral, but returned to the lord: so that in every way the father was excluded.

#### SECT. 4.

*And in case where the sonne purchaseth land in fee simple, and dies without issue, they of his blood on the father's side shall inherite, as heires to him before any of the blood on the mother's side: but if he hath no heire on the part of his father, then the land shall descend to the heires on the part of the mother. But if a man marieth an inheritrix of lands in fee-simple, who have issue a sonne and die, and the sonne enter into the tenements, as sonne and heire to his mother and after dies without issue, the heires of the part of the mother ought to inherit, and not the heires of the part of the father. And if he hath no heire on the part of the mother, then the lord of whom the land*

*is holden shall have the land by escheate. In the same manner it is if lands descend to the sonne of the part of the father, and he entreth and afterwards dies without issue, this land shall descend to the heires on the part of the father, and not to the heires on the part of the mother. And if there be no heire of the part of the father, the lord of whom the land is holden shall have the land by escheate. And so see the diversity where the sonne purchaseth lands or tenements in fee-simple, and where he cometh to them by descent on the part of his mother, or on the part of his father.*

The rule to be deduced from this section and from a pedigree stated by Lord Coke in his comment is, “that in collateral inheritance of an estate, acquired by purchase, the blood of the father shall be preferred to that of the mother, the blood of the paternal grandfather to that of the paternal grandmother, and so on, the male stocks being always preferred to the female.”

This rule is partly to be considered as a consequence of that general preference of males to females, of which I shall speak presently, and partly perhaps as founded on another rule very necessary to be remembered, and which Lord Coke calls an old and true maxim, namely, “That none shall inherit any land as heir, but only the blood of the first purchaser.” That this rule is feudal appears sufficiently from what has been said already; and the



consequence of it is, that if he who dies seised of an estate did not come to it by any kind of purchase as by will, feoffment, or the like, but by descent, then no one can inherit it, but such kinsman as is related to that ancestor from whom it descended, and by whom it was purchased or acquired. If, therefore, land descends to me from my mother as her heir at law, and I die without a will, and no relation to me on the part of my mother can be found, no one of my father's relations will be allowed to inherit, but the land will escheat or fall back for want of heirs to the lord.

#### SECT. 5.

*Also if there be three brethren, and the middle brother purchaseth lands in fee simple, and die without issue, the elder brother shall have the land by descent and not the younger, &c. And also if there be three brethren, and the youngest purchase lands in fee simple, and die without issue, the eldest brother shall have the land by descent, and not the middle; for that the eldest is most worthy of blood.*

From this section, and Lord Coke's comment upon it, two important rules may be drawn.

1st, "That the male and all descended from him shall inherit before the female, and the female on

the part of the father before male or female on the part of the mother." To account for the preference of males and of male stocks to females, it must be remembered that females could not by the feudal law succeed to a proper feud, because they were unequal to the duties or services for the sake of which it was chiefly created. And if it be further observed that it is either *ex pacto* or by the special custom of particular countries that they are even at this day allowed to succeed to any, it cannot seem strange that the feudal preference given to males should prevail with us.

The second rule is: "That among males of equal degree the eldest only shall inherit; but females all equally." As to the preference of the eldest son it may be observed that although all feuds might originally fall among all the sons, yet that course of succession was varied (before any system of feuds was written or digested) in consequence of a constitution of the Emperor Frederic, *viz. Ducatus, Marchia, Comitatus de cætero non dividatur*: (s) upon which feuds in general were divided into *feuda dividua et individua*. Of the latter sort amongst us as well as the Normans were the honorary and military fees or tenures, to which the eldest son, because he was soonest able to do the duties of the fee or tenure, was in the order of succession singly preferred. But to all other feuds

(s) Lib. Feud. c. 4.

as being divisible all the sons might equally succeed. As to the entire descent to the eldest of honorary and military fees, whether it obtained in England before the abovementioned constitution or afterwards as a thing agreeable to the design and nature of feuds, or whether it obtained with us in imitation of other countries, or by virtue of an express law of our own, is not worth our inquiry; since it is certain that it was thought convenient to preserve the fee and the services of the fee entire as the best means to maintain the military force of the kingdom upon a regular and established footing, and that it did therefore every where prevail, and was every where inviolably observed. But socage tenures not being of the same importance as the honorary and military tenures were, as *feuda dividua*, left to descend according to the old usages and customs of the several parts of the kingdom where they lay. Insomuch that it was sometime after the establishment of the entire descent to the eldest son called by some *the total descent*, that socage in imitation of the more honourable tenures began generally (except in Kent and some particular places which adhered to their old usages and customs) to descend to the eldest son. (t) But where the total descent was not admitted, the old customary descent remained, and must still account for the particular local descents remaining at this day in particular places.

(t) Hale's Hist. Com. Law. 120. 153. 226.

If there were no sons the feud came to the daughters, who divided it, because by the donation it was to go to all the descendants; therefore female descendants could not be excluded, and one of the daughters could not be preferred before the other, because none of them could do the service of the feud in their own persons, nor did any of them bear the name and dignity of the family. Therefore these were married by the lords to their own tenants, by which means the lords kept the feuds in their several manors from being broken and divided; as for instance if two daughters divided a knight's fee, the lords by the marriage of such a daughter with one that had half a knight's fee re-established the feuds of their tenants.

#### SECT. 6.

*Also it is to be understood that none shall have land of fee simple by descent as heire to any man, unlesse he be his heire of the whole blood. For if a man hath issue two sonnes by divers venters, and the elder purchase lands in fee simple and dye without issue, the younger brother shall not have the land but the uncle of the elder brother or some other his next cousin shall have the same because the younger brother is but halfe blood to the elder.*

The rule here is "that he who is to inherit as heir collateral must be his next kinsman of

the whole blood to him, who died seised of the estate.”

A kinsman of the whole blood is he who is descended not only from the same ancestor with the *propositus* or person in question, but from the same pair of ancestors. Thus my brother of the whole blood is he who has the same father and mother with me ; my uncle or first cousin of the whole blood is he who not only has the same grandfather but the same grandmother likewise with me.

This rule and that mentioned under sect. 4., by which the male stocks are preferred to the female, are both considered as having been originally rather rules of evidence than principles of law, and as being intended to secure and confine the succession to those who are of the blood of the first feudatory or purchaser. For as it happened in a long course of time that the memory of feudal donations was often worn out, and it became then impossible to compute up to the first marriage when such donations were originally settled, our ancestors changed the mode of computation and counted from the last possessor, provided the heir that claimed was of the blood of the first purchaser, and then the rule was *quod seisinā facit stirpem*, for since the feudal donation was lost in obscurity, they could not regularly compute the descendants from the first feudal marriage, and therefore they

computed from the last feudatory. And since both bloods of the first marriage were necessary to any person that would claim under the first donation, they required that a man should be of the whole blood of the last feudatory, that would claim as heir to him: for if any person was of the whole blood of such feudatory, then he must of necessity be of both bloods of that remote feudal marriage, where the feud was originally placed; and thus the half-blood came to be excluded.

## SECT. 7.

*And if a man hath issue a sonne and a daughter by one venter, and a son by another venter, and the son of the first venter purchase lands in fee and die without issue, the sister shall have the land by descent as heire to her brother, and not the younger brother, for that the sister is of the whole blood of her elder brother.*

This section, as Lord Coke observes, is only an example to illustrate the last section, and needs no explanation.

## SECT. 8.

*And also where a man is seised of lands in fee simple and hath issue a sonne and daughter by one venter and a son by another venter, and die;*

*and the eldest son enter and die without issue, the daughter shall have the land and not the younger son, yet the younger son is heire to the father but not to his brother. But if the elder son doth not enter after the death of his father, but die before any entry made by him, then the younger brother may enter and shall have the land as heire to his father. But where the elder son in the case aforesaid enters after the death of his father and hath possession, there the sister shall have the land, because possessio fratris de feodo simplici facit sororem esse hæredem. But if there be two brothers by divers venters, and the elder is seised of land in fee and die without issue, and his uncle enter as next heire to him who also dies without issue, now the younger brother may have the land as heire to the uncle, for that he is of the whole blood to him, albeit he be but of the halfe blood to his elder brother.*

“ If the elder son doth not enter into the land after the death of his father, but dies before entry made, then the younger brother may enter as heir to his father ;” that is, to the exclusion of the issue of the eldest son. The reason of this is, that *non jus sed seisinam facit stipitem*, he that succeeds to the inheritance must be heir to him who last died seised, that is, legally and notoriously possessed of the estate. The maxim that *possessio fratris de feodo simplici facit sororem esse hæredem* is a necessary consequence of this rule and of the rule

delivered in section 6., that no one shall be heir, who is not of the whole blood.

## SECT. 9.

*And it is to wit, that this word inheritance is not onely intended where a man hath lands or tenements by descent of inheritance, but also every fee simple or taile which a man hath by his purchase may be said an inheritance, because his heires may inherit him. For in a writ of right which a man bringeth of land that was his owne purchase, the writ shall say, Quam clamat jus esse et hæreditatem suam. And so shall it be said in divers other writs which a man or woman bringeth of his own purchase, as appears by the register.*

The purport of this section does not seem to require explanation.

## SECT. 10.

*And of such things whereof a man may have a manuell occupation, possession, or receipt, as of lands, tenements, rents, and such like, there a man shall say in his count countant, and plea pleadant—that such a one was seised in his demesne as of fee. But of such things which do not lie in such manuell occupation, &c. as of an advowson of a church and such like, there he shall say that*



*he was seised as of fee and not in his demesne as of fee. And in Latine it is in one case quòd talis seisitus fuit in dominico suo ut de feodo, and in the other case quòd talis seisitus fuit, &c. ut de feodo.*

In this section we meet with a form of pleading which is another proof of the general prevalence of feudal principles.

Demesne, according to Lord Coke's etymology, is derived from *de main*, or manual occupation : but as it is in Latin *dominicum*, it may much more probably be derived from *dominus*. It seems to have imported originally the land, which the lord of a manor kept to himself, and did not grant out either on freehold or copyhold tenure, and then it came to signify any land which the owner kept in his manual occupation. Now in claiming this absolute and complete title, which unites right and possession, all that the owner can say is, "I am seised of this or that land or tenement in my demain as of fee." *Seisitus inde in dominico meo ut de feodo*. And that is as much as if he had said, it is my demain or proper land after a sort, because it is to me and my heirs for ever ; yet not simply mine because I hold it in fee, *i. e.* in the nature of a benefit from another.

## SECT. 11.

*And note that a man cannot have a more large or greater estate of inheritance than fee simple.*

## SECT 12.

*Also purchase is called the possession of lands or tenements that a man hath by his deed or agreement, unto which possession he commeth not by title of descent from any of his ancestors or cousins, but by his owne deed.*

Purchase includes every lawful method of coming to an estate except descent; whether, as Littleton says, it be by his own deed or by his agreement or consent, as where land is left to him by will and he accepts the devise.

## CHAPTER II.

## OF FEE TAIL.

THE feudal law is evidently founded entirely on this supposition: that all proper feuds were originally given in consideration of personal service, and on condition that the vassal should always be ready to assist his lord with his sword in battle, and by his judicial attendance in the feudal court, when he should be called upon. (*a*)

From this position it naturally followed that no feudal tenant could alien the whole of his land without a licence from the lord of the fee. (*b*) For he could not alien it to be held of his lord, since that were to substitute another soldier in his stead without the consent of his captain; and if he had granted it to another to hold of himself, he must then have remained bound to perform the stipulated services, though he had deprived himself of that which was to support him while he served; an enormity not to be suffered in a military constitution.

(*a*) Craig, lib. 1. tit. 9.

(*b*) Feud. lib. 2. tit. 52. 55.

Neither could the lord part with his manor and the services annexed thereto without the attornment or formal consent of the feudal tenants. (c) For which Bracton assigns this reason, that if the lord had such power he might oblige his tenants to become subject, and take the oath of fidelity to one that was their deadly enemy. (d)

In England lands were not in general held as stipendiary feuds *militiæ gratiâ*, till feudal tenure was by one general law soon after the Norman Conquest superinduced upon all free lands. It was therefore natural to expect, that the severe restraints of the feudal law should, among us, soon wear away. Accordingly we find, that though tenants could not in general lawfully alien or transfer the tenure itself so as to substitute other tenants in their own stead, because, as was observed by Plowden (in the case of the king's tenants) "the trust and conditions of the tenure were by the original gift reciprocal, mutual between the king and his tenant;" (e) yet they either had from the first introduction of feudal tenure amongst us, or very soon acquired by the connivance of the lords and the favour of courts of justice, the power of granting away part, and in some cases the whole, of their lands, even without a licence of alienation; for without relying on the laws of Henry the First, which professed to revive the Saxon jurisprudence,

(c) Feud. lib. 2. l. 31. s. 1.

(e) Moor, 172.

(d) Bract. 31 b.

and which were probably soon disregarded, it appears from Glanville, (*f*) that in the time of Henry the Second every free tenant might alien part of his land in three cases. 1. *In remunerationem servitii*; for services done to the feud, as for serving in the wars or ploughing the land at home, both these being either for the honour or profit of the feudal lord. 2. In free marriage with the daughter of the feudatory or some other of his blood; and this was allowed without fine, because the feud was given in fee to provide for relations and the gift multiplied tenants to the lord. 3. In free alms; the superstition of the times allowing it for the good of the soul. But in all these cases the alienation was to hold of the feudatory, and could not be made without leaving sufficient to answer the feudal services.

This privilege was confirmed by Magna Charta, c. 32. and made more general, so that the feudatory might alien to whomsoever he pleased, leaving sufficient to answer the lord's services. Indeed with respect to this last condition, the provision in Magna Charta was restrictive: since it appears from the same chapter of Glanville, which we have before mentioned, that if a man had no issue, he might have aliened by a deed in his lifetime the whole of lands purchased by himself. "*Si nullum heredem filium vel filiam ex corpore suo procreaverit, poterit quidam ex questu suo cuicunque vo-*

*luerit quandam partem donare, sive etiam totum questum hereditabiliter. (g)*

As a tenant could not alien his fee or tenure without the consent of his lord, so neither could he by the feudal or common law alien a fee that was not of his own acquisition or purchase, that is to say, a fee that came to him by descent, even with the consent of the lord, without the consent of the heir, *qui proximus erat in successione collateralis*, as Craig expresses it. (*h*) For though the law trusted the ancestor with the interest of his own immediate dependents, yet he could not prejudice the next collateral, who having a distinct though remote interest in the feudal donation could not be deprived of it, but by an act of his own. (*i*) The rule in the second book of Feuds, tit. 39. is this: *Alienatio feudi paterni non valet etiam domini voluntate nisi agnatis consentientibus ad quos beneficium quandoque sit reversurum. (k)* This rule however, though acknowledged as law in England, was viewed in our courts with a very unfavourable

(g) Glanv. lib. 7. c. 1. fol. 46.

(h) Craig. de Jure F. 346.

(i) Co. Litt. 94 b.

(k) As in the twelfth century by the feudal law of Lombardy and the empire all feuds, that were noble, were divided equally among sons to the exclusion of females, a constitution of the Emperor Frederic Barbarossa provides that if one of the joint

feudatories wanted to sell, the rest should have *jus προτιμης-σεως*, a right of pre-emption. (Feud. lib. 5. tit. 13.) Of which, says the gloss; *Originem ad jus divinum quidam referunt*, alluding probably to Ruth, ch. iv. and Jerem. ch. xxxii. v. 7. It was indeed nothing more than the *Jus Retractus* of the Romans.

eye, and was rendered ineffectual by various refinements before the reign of Edward the First, when estates tail were first created by act of parliament, and other laws of a similar tendency were made.

The like relaxation obtained amongst us with respect to descents. The feudal law was so strict with regard to *feuda nova*, that the general rule, to which there were few exceptions, was, *Si quis acquisiverit beneficium, et sine filio mortuus fuerit, et fratrem reliquerit, frater non succedat fratri, sed dominus habeat.* (1) But we have seen that by our law an estate in fee newly purchased is considered *ut feudum antiquum*, and passes for want of direct heirs to collateral relations, however distant, subject always to the rules and conditions mentioned in treating of fee simple. And nothing surely can be more reasonable than this rule where a price has been really paid for the purchase. Still however if a *feudum novum* was in truth conferred gratuitously, nothing hindered the donor from giving it with such limitations as he thought fit; and if land was expressly given to *certain heirs* in exclusion of all others, reason and natural justice as well as the spirit of the feudal law seemed to require that the will of the donor should be observed. But as our judges had in opposition to the interest of the lord favoured alienation from good policy; so likewise in opposition to the in-

(1) 1 Feud. lib. 1. tit. 19.

terest of the donor or his heir, who was entitled to the reversion of such limited estate, they put such a construction on this sort of gifts as in a good measure defeated the limitation. This is expressly declared to have been the cause of the statute of Westminster the Second, commonly called the statute *De Donis Conditionalibus*, passed in the thirteenth year of Edward the First; which, as explained by Littleton, I am now to consider.

### SECT. 13.

*Tenant in fee tail is by force of the statute of Westm. 2. c. 1. for before the said statute all inheritances were fee simple; for all the gifts which be specified in that statute were fee simple conditional at the common law, as appeareth by the rehearsall of the same statute. And now by this statute tenant in taile is in two manners, that is to say, tenant in taile generall and tenant in taile speciall.*

Though estates in fee tail according to the present import of the word did not, as Littleton tells us, exist before the statute Westminster the Second; yet there always were in this, as in most other countries of Europe, estates limited and restrained to some particular heirs exclusive of others. As for instance to the heirs male of the body of the donee or feudatory, exclusive of females and col-



laterals, or to the heirs of his or her body exclusive of collaterals only. (*m*)

A fee or inheritance thus limited was at common law known by the name of a fee conditional; so called from the condition expressed or implied in the gift or constitution of the fee, that in case the donee died without such particular heirs, the land or fee should revert to the donor. It appears from the preamble of the statute *De Donis*, that the limitation of a fee conditional at common law was in the very same words as that of a fee tail is at this day; and it has therefore been observed, (*n*) that this statute was not so properly the parent as the nurse of estates tail, since it did not produce but preserve them. In order therefore to explain what Littleton means when he says, that before that statute all inheritances were fee simple, as well as to shew what was the intent and effect of this law, it will be necessary in the first place to give a short

(*m*) In the laws of Alfred, ch. 37., as published by Lambard, we meet with this provision: "*Qui terram habuerit per scripturæ seriem sibi a majoribus relictam, ab hæredibus ad alios alienandi potestas ei non esto, si quidem præsentibus cognatis eorum Rege aut Episcopo, scripturâ aut testimonio probetur omni alienatione ei interdixisse illum,*

*qui prius concessit, talemque ei imposuisse legem cum primo dederit.*" On the discovery of this law Mr. Selden, with some degree of exultation, exclaims in his *Analecta Anglo-Britannica*, "En, jurisperiti, feudum quod dicitis talliatum, Edvardi primi decimo supra tertium anno hic multo antiquius habetis." (1)

(*n*) 1 Rep. 103 b.

(1) Selden's Works, Ed. Wilk. vol. 2. pt. 2. pag. 926.

view of fees conditional, as they were considered at the common law.

An estate then, granted to a man and to the heirs of his body, that is, to his lineal descendants in exclusion of collateral heirs, was certainly in the intention of the donor *feudum novum*; and our courts of justice so far promoted that intention, that if he died seised of such estate, and without issue, it could not descend to his brother or other collateral heir: (o) but it would revert to the donor, of whom it was held as of a lord, and who was entitled to this reversion, even though it were not expressly reserved in the gift; the law annexing this condition so inseparably to the gift of a limited or conditional estate, that if it should be expressed in the deed the recital of it would be superfluous, and it would still be held to be not a condition in deed, but a condition in law. (p)

If lands were given to a man and the heirs male of his body in exclusion not only of collateral heirs but of female descendants, the issue female could not inherit, because the donation expressing particularly what heirs of the donee were to inherit, no heir, though of the body of such feudatory, could inherit that did not come within the words and limitation of the gift, according to the rule mentioned above, that *modus dat legem donationi*.

(o) 1 Roll. Abr. 841.

(p) Plow. Comm. 241 b, 242 a.

Hitherto the intent of the donor seems to have been pretty well observed, and the course of descent was the same as it would now be in an estate tail created by the same form of words. For Lord Coke observes (*q*) that an estate tail is now descendible in the same manner as it was at the common law. But our courts of justice were always inclined to favour alienation, and to prevent the establishment of an inalienable estate called in our law a perpetuity; and this inclination they appear to have shewed very remarkably with respect to fees conditional. They did not indeed give the donee a power of alienation immediately on the gift, because that would have been to deprive the lord of his reversionary right directly contrary to the form of the donation, and without any pretence of reason: but as soon as the issue was born, which by the tenor of the gift might inherit, they then considered the lord's chance as too remote to deserve much attention, especially where his interest clashed with the general rules of policy; and with respect to the right of the child they thought it prudent to leave that as in other cases to the conscience and direction of the parent. They therefore held that as soon as such issue was born, the donee might alien the land, and consequently might either forfeit it by committing treason, or might charge it with right of common, payment of rent, or the like: for the power of en-

(*q*) Co. Litt. 19 a.

cumbering an estate and the capacity of forfeiting it are naturally implied in the power of alienation. (*r*)

In making this construction of a gift, so limited, they seem to have considered it as a conveyance of a fee simple on condition that the donee should have issue ; and to have supposed that the limitation to particular heirs was only to take place in case the donee by dying seised of the estate should make way for the claim of heirship to commence. It was in this light that Littleton considered these gifts when he called them fee simple conditional, though perhaps, even considering them in this light, it would have been more consistent with his own definition of a fee simple to have called them only fees conditional.

The statute by which this construction is condemned and estates tail established is the first chapter of fifty, in the first session of parliament in the thirteenth year of Edward the First, who is called by Sir Edward Coke “our English Justinian.” But how great soever his abilities might be as a legislator, it is probable he did not foresee the effects of this law, which by fixing inalienably the estates of great families, threw an additional weight of wealth and consequently of power into the hands of that part of the legislature which was before too powerful.

The statute first states the form of several limited donations corresponding to the different species of gifts in tail (of all which I shall speak presently) and recites that in all such cases the donees had, contrary to the form of the gift and the intention of the givers, power to alien their *tenements*, and thereby to disinherit their own issue and to bar the donors of their reversions : and therefore it enacts that for the future the intention of the donor shall in every such case be observed, and that the donee shall not have the power to alien.

In the construction of this act of parliament the judges determined that the donee could no longer be said to have a fee simple on condition of having issue : but “ they divided the estate,” says Lord Coke, (s) “ and created a particular or partial estate in the donee and a reversion in the donor.” So that whereas before this act the donee had the fee simple or entire estate, only subject to a condition, by this statute, and the interpretation put on it, he had only an estate tail, an estate limited and circumscribed, and therefore constituting if I may so speak only part of the fee simple : and whereas by the common law the donor had only a bare possibility that the estate might return to him, which possibility might be defeated by the birth of issue and alienation of the tenant, now he has the fee simple expectant on the estate tail ; which ex-

(s) 2 Inst. 335.

pectancy is called a reversion, and is considered as vested in him from the time of the gift, though it cannot have any beneficial effect with respect to him and his heirs till the expiration of the estate tail.

I now proceed to the several species of estates tail.

#### SECT. 14.

*Tenant in taile generall is where lands or tenements are given to a man and to his heires of his bodie begotten. In this case it is said generall taile because whatsoever woman that such tenant taketh to wife (if he hath many wives, and by every of them hath issue) yet everie one of these issues by possibilitie may inherit the tenements by force of the gift because that everie such issue is of his bodie ingendred.*

#### SECT. 15.

*In the same manner it is, where lands or tenements are given to a woman and to the heires of her bodie, &c, albeit she hath divers husbands yet the issue which she may have by everie husband may inherit as issue in tail by force of this gift, and therefore such gifts are called generall tailes.*

As to make a fee or estate of inheritance the

word "heirs" is absolutely necessary in the conveyance (except in the few cases already mentioned) so to make a fee tail or limited inheritance, there should regularly be some word of procreation to denote from what person or two persons the issue is to be derived that is to inherit. The same accuracy however is not necessary with respect to this as to the word "heirs." If the word heirs is but inserted to convey the inheritance, the limitation of that inheritance to particular heirs may be expressed in any words which point out with sufficient clearness the intention of the donor; neither the words "of the body" nor any others, being appropriated to this end, but any equivalent expression will do as well. (t) And the reason of the difference I apprehend to be this, that inheritance being derived from the law, the law requires the word "heirs," a word comprehending the whole complex idea of such legal relation, which hardly any other word or set of words can express : but the limitation of the inheritance to the descendants of this or the other body is only the intention of him that makes the gift, and therefore the law leaves every one to express himself in such manner as may best manifest his intention. A gift therefore to a man and to the heirs, which he shall beget; to a woman and the heirs, which she shall have by any husband, would be estates in tail general equivalent to those which are described in these two Sections.

The statute to express its subject matter makes use of the word "*tenementum*;" and therefore the estate to be intailed may be as well incorporeal as corporeal because the word *tenementum* comprehends the one as well as the other; and consequently not only lands, but rents, commons, estovers, or other profits arising from land, may be entailed. Neither is it necessary that the thing entailed should issue out of land; for if it be annexed to lands, or in any way concerns or relates to them, it may be entailed within the statute. Therefore offices and dignities relating to lands may be so entailed. Accordingly an earldom, which we have before observed is a tenement, may be entailed, within the statute by the express grant of the king. (*u*) So offices may be entailed as the office of Earl Marshal of England, or the office of stewards, bailiff or receiver of a manor, because the office of Earl Marshal relates to the territory of England, and the other offices abovementioned are demandable in a real action *ut tenementa*, and being exercisable within the manor are therefore looked upon as members or branches of it. But things merely personal which only charge the person, and neither issue out of land nor relate to it, nor can be demanded *ut tenementa* in actions real, cannot be entailed within the statute. Therefore if I grant to B. and the heirs of his body to be master of my hawks or keeper

(*u*) Nevil's case, 7 Rep. 53.



of my hounds with a fee or salary annexed to it, this is no entail within the statute, because this can no way fall within the notion of *tene-mentum*. (x)

### SECT. 16.

*Tenant in taile speciall is where lands or tenements are given to a man and to his wife and to the heires of their two bodies begotten. In this case none shall inherit by force of this gift but those that be engendered between them two. And it is called especiall taile because if the wife die and he taketh another wife and have issue, the issue of the second wife shall not inherite by force of this gift nor also the issue of the second husband if the first husband die..*

This section requires no explanation: but as Littleton has mentioned the general division of estates tail into general and special, and has given an instance of each sort, it may not perhaps be amiss in this place to observe that fee tail is divided into *general* and *special*. Fee tail general is subdivided into, 1st. Fee tail general simply so called, which is without limitation of sex in the heir, and of which sort are the instances mentioned in Sections 14 and 15. 2dly, Fee tail male general;

as in Sect. 21. 3dly, Fee tail female general, described in Sect. 22. Fee tail special is divided in the same manner into, 1st. Fee tail special without any limitation of sex, which is described in this section ; 2dly, Fee tail male special explained in section 25 ; and, 3dly, Fee tail female special, which is the exact counterpart of that last mentioned.

### SECT. 17.

*In the same manner it is where tenements are given by one man to another with a wife (which is the daughter or cousin to the giver) in frank marriage, the which gift hath an inheritance by these words (frank marriage) annexed unto it, although it be not expressly said or rehearsed in the gift (that is to say) that the donees shall have the tenements to them and to their heires betwene them two begotten. And this is called especial taile because the issue of the second wife may not inherit.*

Frank Marriage, *Liberum Maritagium*, was so called to distinguish it from *maritagium servitio obligatum*, which Bracton (*y*) describes to be when any man gave tenements to another with a wife "*retento sibi et hæredibus suis servitio debito.*" The same feudal strictness concerning the construc-

(*y*) Bract. fo. 29.

tion of gifts, which requires the word "heirs" to make an estate of inheritance, renders it necessary in the creation of this estate to use the very words "frank marriage" in English, or "*liberum maritagium*" in Latin. (2) And we learn from Bracton (a) this was the rule in his time.

By the words "frank marriage" alone an estate in special tail is created, but differing in some of its consequences from similar estates in special tail of the common sort ; *ex. gr.* If lands be given to a man and his wife in special tail, and they are divorced *a vinculo matrimonii* for a cause that existed before marriage, as for consanguinity or any other cause such as precontract was before it ceased to be a cause of divorce, they shall both have the profits of the land during their lives. But if donees in frank marriage are so divorced, the woman shall enjoy the whole estate, because she was the cause of the gift.

The form of a gift in frank marriage may be seen at length in West's Symboleography, Part I. lib. ii. s. 258. But it would be vain to look for it in any more modern book of conveyancing because though it was very usual and very useful in days when writing was rare, practisers ignorant, and few forms of deeds were settled, it has now grown obsolete, and has given place to jointures of which I shall speak more at large hereafter.

(2) See Coke on this Section.

(a) fo. 21.

## SECT. 18.

*And note that this word talliare is the same as to set to some certaintie or to limit to some certaine inheritance. And for that it is limited and put in certaine what issue shall inherite by force of such gifts and how long the inheritance shall endure it is called in Latine feodum talliatum, i. e. hæreditas in quendam certitudinem limitata. For if tenant in generall taile dieth without issue the donor or his heires may enter as in their reversion.*

This explanation of the word *talliare* is quoted from Littleton by Dufresne in his glossary. As it seems to be derived from the same source as the French "*tailler*," its primary signification seems to be *to cut*, and *to limit* is a secondary meaning: and as applied to this species of estate, it may full as properly be referred to the former as to the latter, for the estate in fee or perpetual interest, which the donor had, is cut or divided into one or more particular estates, as they are called, and a remainder or reversion, between which two last expressions the following distinction may be here taken. A remainder may be described to be the remnant of an estate in lands or tenements expectant on a particular estate, as an estate in tail or for life, created together with the same and at the same time, and so expectant on the particular estate that unless it can take effect, when the particular estate deter-

mines, it is void. (b) A reversion is where the residue of the estate granted still continues in him who made the particular estate. (c)

### SECT. 19.

*In the same manner it is of the tenant in especiall taile, &c. For in every gift in taile without more saying the reversion of the fee-simple is in the donor. And the donees and their issue shall do to the donor and his heires the like services as the donor doth to his lord next paramount except the donees in frank marriage who shall hold quietly from all manner of service (unless it be for fealtie) untill the fourth degree is past; and after the fourth degree is past, the issue in the fifth degree, and so forth the issues after him shall hold of the donor or of his heires as they hold over as before is said.*

### SECT. 20.

*And the degrees in frank marriage shall be accounted in this manner, viz. from the donor to the donees in frank marriage the first degree because the wife that is one of the donees ought to be daughter sister or other cosen to the donor. And from the donees unto their issue shall be accounted the second degree, and from their issue unto their issue the third degree, and so forth. And the reason is, because that after every such gift the issues of the*

(b) 2 Rep. 51. Vaugh. 269.

(c) Plow. 160.

*donor and the issues of the donees, after the fourth degree past of both parties in such forme to be accounted may by the law of the holy church entermarie.*

All consanguinity depends on the descent from one common ancestor, and therefore in computing the degrees of kindred recourse must always be had to the common stock. But in the method of computing, there is some difference between the Civilians and the Canonists. The Civilians, beginning with the parent of one of the parties as the first degree, reckon upwards to the common stock, and then down again to the other party. The Canonists beginning at the common ancestor reckon downwards from him to each of the parties ; and if they are equally distant from the common ancestor, the degree in which each of them is distant from him is the degree in which they are collaterally related to each other : but if they are unequally distant from the common stock, then the degree in which the more remote of them stands to the ancestor is that in which they are likewise related to each other. Thus if we would compute the relation which his (late) Majesty king George III. bore to the great Frederic king of Prussia, we must first look out for the common ancestor, whom we find to have been king George I. great grandfather to king George III. and grandfather to the king of Prussia. Then according to the Civilians we must reckon Frederic prince of Wales, father of his (late) Majesty king George III. one degree, king

George II. two, king George I. the common stock three, Sophia, queen consort of Prussia, daughter of king George I. four, her son king Frederic III. five degrees. But according to the Canonists, whose manner of reckoning the common law has adopted, we must begin at the common ancestor George I., and descending from him to king George II. that is one degree. Frederick prince of Wales is in the second, and king George III. is in the third degree. Then again Sophia, queen of Prussia, makes one degree from the common ancestor, and Frederic king of Prussia her son makes the second; so that king George III. who was most distant from the common stock, being related to him in the third degree, that is likewise the degree in which he and the king of Prussia were related to each other.

#### SECT. 21.

*And all these entailes aforesaid be specified in the said statute of W. 2. Also there be divers other estates in taile, though they be not by expresse words specified in the said statute, but they are taken by the equitie of the same statute. As if lands be given to a man and to his heires males of his bodie begotten; in this case his issue male shall inherit and the issue female shall never inherit, and yet in the other entailes aforesaid it is otherwise.*

## SECT. 22.

*In the same manner it is if lands or tenements be given to a man and to his heires females of his bodie begotten ; in this case his issue female shall inherit by force and forme of the said gift and not his issue male. For in such cases of gifts in taile the will of the donor ought to be observed, who ought to inherit and who not.*

## SECT. 23.

*And in case where lands or tenements be given to a man and to the heires males of his bodie and he hath issue two sonnes and dieth, and the eldest son enter as heire male and hath issue a daughter and dieth his brother shall have the land and not the daughter, for that the brother is heire male. But otherwise it is in the other entailes which are specified in the said statute.*

These sections require no explanation.

## SECT. 24.

*Also if lands be given to a man and to the heires males of his body, and he hath issue a daughter, who hath issue a son, and dieth, and after the donee die ; in this case the son of the daughter shall not inherit by force of the entaile ; because whosoever shall inherit by force of a gift in taile made to the*



*heires males ought to convey his descent whole by the heires males. Also in this case the donor may enter, for that the donee is dead without issue male in the law insomuch as the issue of the daughter cannot convey to himselfe the descent by an heir male.*

### SECT. 25.

*In the same manner it is where lands are given to a man and his wife and to the heires males of their two bodies begotten, &c.*

“ Thus in proper feuds, to which only males succeeded, not only daughters, but the son of a daughter, was excluded from the inheritance.” *Ad filias vero seu neptes vel proneptes vel ex filiâ nepotes vel pronepotes successio feudi non pertinet; proles enim feminei sexûs vel ex femineo sexu descendens ad hujusmodi successionem aspirare non potest nisi ejus conditionis sit feudum vel eo pacto acquisitum.*” (d)

### SECT. 26.

*Also if tenements be given to a man and to his wife and to the heires of the bodie of the man, in this case the husband hath an estate in generall taile and the wife but an estate for terme of life.*

### SECT. 27.

*Also if lands be given to the husband and wife*

(d) Feud. lib. 2. tit. 11.

*and to the heires of the husband which he shall beget on the body of the wife, in this case the husband hath an estate in especiall taile and the wife but an estate for life.*

# SECT. 28.

*And if the gift be made to the husband and to his wife and to the heires of the body of the wife by the husband begotten, there the wife hath an estate in speciall taile and the husband but for terme of life. But if lands be given to the husband and the wife and to the heires, which the husband shall beget on the body of the wife in this case both of them have an estate taile, because this word (heires) is not limited to the one more than to the other.*

All that is remarkable in these sections is that the word "heirs" in the grant constitutes the fee: therefore the party to whom the word "heirs" has relation is tenant in tail, the other only tenant for life. For to whichsoever of the two persons named the word "heirs" inclines by the limitation, it creates a descendible estate in that person: but if it be not more particularly limited to the body of one than of the other, inclining to each alike, then it creates a descendible estate in both. (c)

## SECT. 29.

*Also if land be given to a man and to his heires which he shall beget on the body of his wife, in this case the husband hath an estate in speciall taile and the wife hath nothing.*

Here the woman is merely the instrumental cause of those heirs who are to inherit, but has herself no estate; and therefore if the husband die, the woman will not receive any thing by virtue of the gift. (f)

## SECT. 30.

*Also if a man hath issue a sonne and dyeth, and land is given to the sonne and to the heires of the body of his father begotten, this is a good entaile and yet the father was dead at the time of the gift. And there be many other estates in the taile by the equity of the said statute which be not here specified.*

## SECT. 31.

*But if a man give lands or tenements to another, to have and to hold to him and to his heires males or to his heires females, he to whom such a gift is made hath a fee simple because it is not limited by the gift of what bodie the issue male or female shall be and so it cannot in anywise be taken by the equitie of the said statute; and therefore he hath a fee simple.*

(f) See sect. 53.

The reason of this case, to express it more fully, is that such a donation not limiting the feud to the descendants of any particular body cannot be good as a *feudum novum*; and if it be construed a *feudum antiquum*, the course of descent cannot be altered by any man's private fancy; and since it appears from the words of the donation, that the donor intended an estate of inheritance, his words shall be taken most strongly against himself, and shall pass the most absolute estate of inheritance, that is to say, a fee simple to which not only his lineal heirs but also his collateral heirs are inheritable. For where all the legal requisites to the efficacy of a deed are observed, as in this case by the insertion of the word "heirs," the rule of construction then takes place that "*verba fortius accipiuntur contra proferentem.*" (g)

These estates being thus made by the stat. Westm. the 2d. had various fates, every age looking on them with a different aspect. In the Year book 5 Edw. III. 14. it is said by C. J. Herle that they were sage men that made this act, and though the statute *de modo levandi fines* was allowed to be a most excellent law, yet the stat. Westm. 2. having provided *quod finis ipso jure sit nullus*, the judges construed a fine levied by tenant in tail to be no

bar. (h) So that for 200 years these estates were favoured; and the nobility being always fond of this act, because it preserved their estates from

(h) A fine as well as a recovery however became ultimately a mode of barring entails.

Fine, in Latin *finis*, is an amicable accommodation of a suit in law concerning real property recorded in the King's Court of Common Pleas. *Finis*, says Spelman in his glossary, *est solemnis ritus transferendorum prædiorum quo nihil sanctius vel augustius ad alienationes et hereditates stabiliendas.*

A fine was in its original the conclusion of an actual suit determined and recorded. This fine was found to be so firm an establishment of property, that it has now been long the practice to erect an artificial title by levying a fine in a fictitious suit.

To levy a fine, which according to the popular use of the words would imply the same as *multam imponere vel extorquere*, is in the Latin of the law *levare finem*, to raise or accelerate the settlement of a contested title.

The method of levying a fine is this: When A. has agreed to transfer any part of his lands

to B. if it be thought expedient to levy a fine, B. sues out of the Court of Common Pleas a writ of covenant, by which he complains that A. detains from him certain lands, which he is bound by covenant to deliver to him. For this writ a fine is paid to the King. A. who is called the *deforciant*, because he is supposed to be keeping B. out of possession, is then feigned to make overtures of accommodation to B., which B. is willing to accept, but being bound to prosecute his suit, must solicit the permission of the court to be allowed to put an amicable termination to it. This permission, which is granted of course, is called *licentia concordandi*, and for this a second fine is due to the King.

Then comes the concord or fine, that is, the final determination. The two parties come before one of the judges of the Common Pleas, or special commissioners appointed for the purpose. Then A. *levies the fine*, that is, he makes an end of the suit by acknowledging the claim of B. to be just. From this acknowledgment he is termed in

forfeiture, there was no hope of getting it repealed by the legislature. The judges were therefore forced to use art to evade by con-

law the *conusor*, or recogniser of another's right, and B. whose right is thus recognized is called the *conusee*.

As this fine is conclusive on the parties, and those who may possibly be injured are without remedy, the stat. 18 Edw. I. *de modo levandi fines* prescribes that great care be taken lest the conusor injure himself by precipitancy or ignorance, that he be of full age, of sound mind, and at liberty. This is an act likewise in which a married woman may concur; she is therefore to be privately informed of its tendency, and must be examined publicly whether she acts by free will or under the influence of her husband. A man not of sane mind ought not to be permitted to levy a fine: but if he be suffered to do it he is bound forever. *Fieri non debet factum valet*. See West's Symb. 3. a.

There is then a note of the fine taken, or an abstract made of the writ and concord, which by stat. 5 Hen. IV. c. 14. must be inrolled of record.

Then comes the foot of the

fine, or the last instrument of concord, which recites the whole proceeding, and being engrossed upon indentures at the chirographer's office, is delivered to the conusor and conusee.

The law has also provided that this concord so made shall be sufficiently promulgated. By stat. 22 Edw. I. stat. 1. c. 1. fines in court shall be read openly, and in the mean time all pleas shall cease, and this must be done two days in the week.

By the stat. 18 Edw. I. (*de modo levandi fines*) a fine foreclosed all persons who were of full age out of prison, of sound memory, and within the four seas, on the day of the fine levied, if they put not in their claim within a year and a day. This restraint appears to have been found by experience to be too rigorous, and therefore the stat. 1 Rich. III. c. 7. saves to all persons such right as they have to the lands at the time of the fine engrossed, so that they pursue their right by action or by entry within five years after the proclamation made: and to all persons the right that shall accrue

struction a law by which intolerable inconvenience had been introduced. From the resolution in Taltarum's case, in the 12th year of

or come to them after the fine engrossed, by force of any gift in tail, or other cause had before the fine levied, so that such persons pursue their right according to law, within five years after such title shall come to them; and if such persons at the time when such titles come, be married women, within age, out of the kingdom, or not of sound mind, the right shall be reserved to them and their heirs, till those obstructions are removed, provided they pursue their right within five years after their release from legal impediments.

The stat. 4 Hen. VIII. c. 24. made no other alteration in the law, except to provide that after engrossment a fine in order to produce the effect abovementioned of binding persons not parties, should be openly and solemnly read and proclaimed in the same court in the same term, and in three terms then next following the engrossing the same in the same court, at four several days in every term, and in the same time that it is so read and proclaimed, it is provided that all pleas shall cease.

The saving of this statute was to the same effect as the former stat. 1 Rich. III. but the question whether a fine by tenant in tail would bar the issue never seems to have been agitated till the case reported in the Year book, 19 Hen. VIII. 6. b. when in an argument at Serjeants' Inn before all the justices, five justices to three determined that such a fine with proclamations did bar the issue in tail. It was however thought expedient to provide specially for the case by an act of parliament. It was accordingly enacted by stat. 32 Hen. VIII. c. 36. that a fine properly levied with proclamations by tenant in tail should be a bar against all persons claiming by force of the entail.

By the stats. 23 & 31 Eliz. new regulations are made in the process, but without change in the effect of a fine. By stat. 4 Ann. c. 16. no claim of entry is of force to avoid a fine, unless an action be commenced within a year after making it, and prosecuted with effect.

There are various kinds of fines according to the purpose of

Edw. IV. most writers date the æra of common or fictitious recoveries, by which under the fictitious form of a real action tenant in tail was enabled at all times to bar his issue, and all remainders over, and acquire the absolute fee simple. It is true *prætoris est jus dicere, non condere*; and this altering the law and evading the stat. of Westm. 2. seems to be a repeal of a positive law without the legislative power: but use and custom have long sanctioned common recoveries, and the judges will not now suffer them to be shaken or controverted.

The method of suffering a recovery is this.

Tenant in tail engages some friend to bring a real action to recover the estate from him upon a feigned title, it being agreed between them that the estate so recovered shall be restored to the tenant in tail in the state in which it is recovered. The action is accordingly brought in the Court of Common Pleas against tenant in tail for the land of which the friend who brings the action and is called the *demandant* declares himself the true owner, having, as he alleges, been driven out of his possession by one B. during whose usurpation the defendant who in these cases is called the

the parties, and the quantity of estate intended to be granted. The most common kind of fine, and that which is usually understood when tenant in tail is said

to levy a fine, is that by which an estate in fee passes to the conusee, and is called a *fine sur conusance de droit come ceo que il ad de son donc*.



tenant entered upon it. The writ which commences the proceedings is called a *præcipe* from the first word of it, and the person against whom it runs is called the tenant to the *præcipe*. The tenant to defend his title against the demandant affirms that he bought the lands upon a title warranted by one C. whom he therefore cites or *vouches* to defend the title so warranted. C., who is usually the crier of the court and is called the common vouchee appears, and defends the title of the tenant. The demandant demands a conference or imparlance with the common vouchee in consequence of which the common vouchee makes default and vanishes; the land is therefore adjudged to the demandant for the non-appearance of the vouchee now the defendant, and is delivered to him with all the semblance of legal exactness by the sheriff of the county. The original tenant or defendant has a recompence publicly granted to him out of the lands of the common vouchee (who in fact has no land) but *privately* has the land restored to him by the recoveror according to their agreement.

The obvious consequence of this fictitious proceeding is, that though tenant in tail takes back the same land, he takes the estate recovered in the plight in which the recoveror possessed it, that is disencumbered of the entail since the recoveror was a perfect stranger to it. (*i*)

(*i*) From the foregoing observations it appears that the potency of a fine falls far short of that of a recovery. A recovery we have

seen gives to the tenant in tail an absolute fee simple; for the proceeding in a recovery, although fictitious, is substantially adverse; therefore a recovery immediately that it is suffered is conclusive, not only upon the issue, but upon all those claiming either in remainder or reversion. But a fine being an amicable proceeding, is binding upon third parties only as far as the statute law has made it so. A fine therefore, although it binds the issue immediately, does not bind remaindermen or reversioners, unless they neglect to pursue their claim for five years after the termination of the estate tail by defect of issue of tenant in tail. The conusee therefore of a fine levied by tenant in tail has only an inferior kind of estate called a base fee, determinable on the

defect of the issue capable of inheriting the entail.

Where indeed the tenant in tail has the reversion in fee in himself, without any intervening estate to any other person, it might appear indifferent by which mode he should bar his issue: but that is not the case. For since the effect of a fine is to give him only a base fee determinable on failure of issue, this estate will be immediately extinguished in the reversion, from which his estate tail was only kept distinct by force of the *stat. de donis*. The consequence will be that all charges affecting the reversion, whether made by himself or any ancestor, will immediately be brought into operation, and will affect the estate in possession.—EDITOR.

## CHAPTER III.

### OF MERE FREEHOLDS.

An estate of mere freehold, or the lowest estate of freehold as distinguished from an estate of inheritance, is that which endures for the life only of the possessor or of some other man.

It is defined by some of our juridical writers to be the "possession of the soil by a freeman," or simply "the possession of the land." On the first view of these definitions it is obvious to ask, why the term freehold should not include a lease for years or at will, as well as an estate for life; since according to the import of the word "possession," independent of all legal notions and refinements, he who is tenant for years or at will appears to have as truly the actual possession of the soil, as if he had a larger and more durable estate. But the law seems originally to have considered a lease for years as a personal chattel, whereby the lessor in consideration of rent conveyed to the lessee a right only to use and take the profits of the land in the name and as the steward of the lessor: so that though he is possessed of an interest therein, he is

not seised or legally possessed of the land. He is one, as Bracton (a) expresses it, *qui tenet nomine alieno*, and whose possession is therefore deemed in law the possession of his landlord to whom the freehold belongs. In order to account for this it is necessary to recollect, that though at first feuds were precarious and at the will of the lord, yet when the feudal law had obtained some degree of form, and feuds in the ninth and tenth centuries began to be frequently inheritable, no less estate was considered as feudal than that which lasted for life at least. Consequently he who enjoyed any less durable interest as for years or at will could make no part of the feudal militia (if I may so speak); could be no tenant or landholder acknowledged by the public, and therefore could by the public be considered only as the agent or servant of the proper feudatory or vassal; but he who had an estate for life conferred upon him by one who had the power to grant, and with the ceremony of corporeal investiture in the presence of the free tenants of the same lord, had *beneficium* at least if not *feudum*; a military estate acknowledged by the feudal constitution, though not an estate of inheritance. In like manner, in our law a freehold is most properly conveyed by livery of seisin, *i. e.* delivery of possession, and anciently could not be conveyed without such livery. And as in that age or state of feudal jurisprudence, when military estates were

(a) Bract. fol. 224.

frequently but not universally hereditary, *beneficium* in the largest sense of the word might have been divided into *feudum* or an hereditary fief, and mere *beneficium* which was only for life ; so with us freehold or frank tenement is divided into fee or freehold of inheritance, and mere freehold, which dies with the possessor. Accordingly Britton, with whom we shall find Littleton to agree, defines frank tenement to be “ a possession of the soil or of services issuing out of the soil, which a freeman holdeth in fee to him and his heirs, or at least for term of his life, though the soil may be charged with free services or other.” (b)

Estates of mere freehold or estates for life are of four kinds.

1. An estate tail after possibility of issue extinct.
2. An estate by the curtesy of England.
3. A tenancy in dower ; and,
4. An estate for life, strictly so called.

Of which the three first arise from the operation of law, the last is created by the act of him who expressly gives or confers the estate.

(b) Britt. Ch. 32. Bract. lib. 2. c. 9. fol. 26 & 27.

1. Tenant in tail after possibility of issue extinct is thus described by Littleton.

### SECT. 32.

*Tenant in fee tail after possibility of issue extinct, is where tenements are given to a man and his wife in especiall taile; if one of them die without issue, the survivor is tenant in taile after possibilitie of issue extinct. And if they have issue and the one die, albeit that during the life of the issue the survivor shall not be said tenant in taile after possibilitie of issue extinct; yet if the issue die without issue, so as there be not any issue alive which may inherit by force of the taile, then the surviving party of the donees is tenant in taile after possibilitie of issue extinct.*

The survivor whether husband or wife who has this estate is called "tenant in fee tail," because it is plain that the estate which was originally granted, and which has not been forfeited by any act of the tenant, was a limited estate of inheritance: but the words "*after possibility of issue extinct*" are added to shew the hopeless condition of that inheritance, which now with respect to its duration is turned into an estate for life. The possibility of issue however must always be supposed to exist, as long as both the parties are alive, even though they should live together, till each of them is an hundred years old; for as no age can be fixed at which it

begins to be physically impossible for man or woman to have children, the law has fixed no age at which it shall be supposed to be impossible.

This estate, as Lord Coke expresses it, must be created by the act of God, and not by limitation of the party; *ex dispositione legis*, and not *ex provisione hominis*. (c) It cannot therefore arise from any act or event, but the death of one of the parties. If therefore a man and his wife, who are donees in special tail, are divorced *a vinculo matrimonii*, whereby it becomes impossible that they should have issue capable of inheriting *secundum formam doni*, yet neither one nor both of them shall be said to have an estate tail after possibility of issue extinct, but their estate of inheritance is turned into a joint estate for life.

### SECT. 33.

*Also if tenements be given to a man and his heires, which he shall beget on the bodie of his wife, in this case the wife hath nothing in the tenements, and the husband is seised in especiall taile. And in this case if the wife die without issue of her body begotten by the husband, then the husband is tenant in taile after possibility of issue extinct.*

We have before had occasion to observe, that as

in the conveyance or creation of every fee, the word "heirs," and that word only, constitutes an inheritance; so in a gift in special tail if the word "heirs" inclines by the limitation to one of the donees and not the other, it creates a descendible estate in that party only. (d) If therefore lands are given to a man and his wife, and the heirs of the body of the man, the woman will have only an estate for life, and the man an estate in special tail; and when as in the present case the gift is to a man and *his heirs* begotten on such a woman, he only is donee, and the woman has no estate at all, because by the words of the donation nothing is conveyed to her; and yet as she is to be the instrumental cause of inheritance the parent of that issue, which is to succeed as heir to the donee in tail, if she die without such issue all possibility of descent according to the tenor of the donation is at an end, and consequently the donee can for the future be only tenant in tail after possibility of issue extinct.

#### SECT. 34.

*And note, that none can be tenant in tail after possibility of issue extinct; but one of the donees or the donee in especiall taile. For the donee in generall taile cannot be said to be tenant in taile after possibility of issue extinct; because alwaies during*



*his life he may by possibility have issue, which may inherit by force of the same entaile. And so in the same manner the issue which is heir to the donees in especiall taile, cannot be tenant in taile after possibility of issue extinct, for the reason above-said.*

If one of the donees in special tail dies without issue, it is plain that the other can have no hope of transmitting the estate as an inheritance to his posterity. But he who has an estate to him and the heirs of his body, whether the sex of such heirs be limited or not, is never during life without possibility of issue that may inherit, because he is not restrained to have that issue by any wife particularly named, and because as was before said neither nature nor law has fixed any time of life at which that possibility must necessarily cease. The same may be said of him who succeeds to an estate as heir to the donees in special tail, for though his ancestors, the original donees, were each confined to such heirs as should be the issue of the other, and therefore if one of them had died without heirs the other would have been hopeless, yet this is not his case, for as he is not restrained to any particular wife by name, any lawful issue that he may have by any woman is capable of inheriting, and he may be considered in effect as tenant in tail general.

Though the term "tail," *tallia* or *feudum talliatum*, was not known in the primitive feudal law, yet

in its nature and effects every proper feud was an estate in tail male general, a gift to a man and the heirs male of his body exclusive of female descendants, and of all heirs not descended from the first donee; but without limitation of any wife by whom such first donee was to have issue. The estate after possibility of issue extinct could therefore have no place among proper feuds. Yet it seems to be a natural consequence of our law of tenures. For as I apprehend both the donees in special tail must have done homage for the estate, which no mere tenant for life was admitted to do, (*e*) and as the

(*e*) Homage, says Littleton in sect. 85. is the most honourable service, and most humble service of reverence, that a frank tenant may do his lord. For when the tenant shall make homage to his lord he shall be ungirt, and his head uncovered, and his lord shall sit and the tenant shall kneel before him on both his knees, and hold his hands joyntly together betweene the hands of his lord, and shall say thus: I become your man from this day forward of life and limbe, and of earthly worship, and unto you shall be true and faithfull, and bear to you faith for the tene-ments I claime to hold of you, saving the faith that I owe to our Sovereign Lord the King, and then the lord so sitting shall kisse him.

Sect. 89. If a man hath several tenancies which he holdeth of several lords, that is to say every tenancy by homage, then when he doth homage to one of his lords he shall say in the end of his homage done, saving the faith which I owe to our Lord the King, and to my other lords.

Sect. 90. Is to the following effect. None shall do homage but such as have an estate in fee simple or fee taile in his own right, or in the right of another. For it is a maxime in law, that he which hath an estate but for terme of life shall neither do homage or take homage.

Sect. 91. Fealty is the same that *fidelitas* is in Latine. And when a freeholder doth fealty to

obligations of fealty and protection were mutual, it was reasonable that on the death of one of the donees without issue inheritable, the survivor should continue to hold the lands by the same services, and with the same privileges as before ; so far at least

his lord, he shall hold his right hand upon a book, and shall say thus, Know ye this my lord that I shall be faithfull and true unto you, and faith to you shall beare for the lands which I claime to hold of you, and that I shall lawfully doe to you the customes and services which I ought to do at the termes assigned, so help me God and his saints ; and he shall kisse the book. But he shall not kneele when he maketh his fealtie, nor shall make such humble reverence as is aforesaid in homage.

Sect. 92. And there is great diversitie between the doing of fealty and of homage : for homage cannot be done to any but to the lord himself, but the steward of the lord's court or bailife may take fealty for the lord.

Sect. 93. Also tenant for life shall do fealtie, and yet he shall not do homage. And divers other diversities there be between homage and fealty.

clearly appears is, that in our ancient law some reason existed for making an essential distinction between fealty and homage : but it no where satisfactorily appears, what obligations homage imposed upon the tenant, which might not have been implied in fealty. They appear evidently to be of the same nature, for fealty is incident to homage ; and the best conjecture that can be made seems to be, that homage required some more active demonstration of fidelity than mere fealty, which all tenants having a determinate interest were called upon to do. See Hargr. Co. Litt. 67. b.

The stat. 12 Ch. II. c. 24. amongst other provisions wholly discharges all tenures from the incident of homage ; not because homage itself was any grievance, but because though not wholly, yet it was more properly an incident to knights' service which the statute abolishes. Fealty continues to this day, though it is no longer the practice to exact the performance of it.—EDITOR.

From these sections all that

as was consistent with the limited duration of the estate. Accordingly this estate in many of its incidents agrees rather with a tenancy in tail than with an estate for life.

Lord Coke enumerates eight privileges which this estate has in common with an estate tail, and four qualities in which it agrees with an estate for life. Of the privileges which it possesses in common with estates tail the most remarkable appears to be, that tenant in tail after possibility of issue extinct has power over the lasting improvements of the land; and therefore shall not be punishable or accountable for waste committed, that is, for alterations made or hurt done to houses, woods, meadows, or other parts or appurtenances of the inheritance. The most remarkable quality which this tenant has in common with tenant for life, and in contradistinction to tenant in tail, is, that if he aliens the estate in fee simple (as if it were absolutely his own) he forfeits his right to the next person in remainder or reversion, as a punishment for his fraudulent attempt; whereas if tenant in tail does this, his act is voidable by the issue in tail, but he to whom the estate is limited in remainder cannot take advantage of it as a forfeiture, because as long as the issue in tail subsists he is no way injured by it. These two rules are in some editions inserted in Littleton's text: but, as Lord Coke observes, they are no part of his work, though agreeable to law.

## 2. Of tenant by the curtesy.

## SECT. 35.

*Tenant by the curtesy of England is where a man taketh a wife seised in fee simple, or in fee taile generall, or seised as heir in taile especiall, and hath issue by the same wife male or female borne alive, albeit the issue after dieth or liveth, yet if the wife dies the husband shall hold the land during his life by the law of England. And he is called tenant by the curtesie of England, because this is used in no other realme but in England onely.*

*And some have said that he shall not be tenant by the curtesie, unlesse the childe which he hath by his wife be heard crie ; for by the crie it is proved, that the childe was borne alive. Therefore quære.*

Tenancies by the curtesy of England, though so called as if they were peculiar to England, were known not only in Scotland but in Normandy also : “ *Angli curialitatem Anglicam vocant quasi ea apud solos Anglos locum haberet, sed falluntur : nam et apud nos et Normannos huic curialitati locus est.*” (f) And the like law or custom is to be found among the ancient Almain laws. (g). And

(f) Craig. de Jur. Feud. lib. 2. tit. 22. s. 13.

(g) Ll. Almanorum ap. Lindenbr. tit. 92.

yet it is not believed to have been feudal, nor does its origin any where satisfactorily appear. Some English writers (*h*) ascribe it to Henry the First: but Nathaniel Bacon (*i*) calls it a law of counter-tenure to that of dower, and yet supposes it as ancient as the time of the Saxons, and that it was therefore rather restored by Henry the First than introduced by him. But there are no notices of this curtesy among the laws of the Saxons, nor among those we have of Henry the First.

The appellation given in Latin to him who has this estate is *tenens per legem Angliæ*, and there is an old law, or rather a recital of law, which is mentioned by Lord Coke as the statute *de tenentibus per legem Angliæ*, and which is printed with that title in Cay's edition of the statutes among those of uncertain date, in the times of Henry the Third and of Edward the First and Second. (*k*) But of this statute Rastall observes, in his edition of the old statutes into English, that it does not seem to be an act of parliament, but only the opinion of some private man; and it is now, I believe, generally agreed to be nothing more: but I wonder that it has not been hitherto observed that this pretended statute is merely a paragraph copied almost verbatim from Glanvill. lib. 7. c. 18. and beginning abruptly with the words *Cum quis itaque*, which connect it with what goes before in that author.

(*h*) Mirror, c. 1. s. 3.

p. 105.

(*i*) Bac. Government. 4to. 1647.

(*k*) Cay's Stat. Vol. I. p. 209.

Glanville therefore, who wrote in the time of Henry the Second, seems to be the oldest writer that mentions this law ; and in the 11th year of Henry the Third a writ was sent to Ireland to enjoin the observance of it there, in which it is very accurately stated, and is called *Consuetudo et lex Angliæ*. (1)

Not only this writ, but likewise Glanville, Bracton, Britton, Fleta, and all our ancient writers, except the Mirror of Justices, which describes it very shortly and inaccurately, mention it as essentially necessary to the existence of this estate that the child be heard to cry, “ *Cujus clamor auditus fuerit intra quatuor parietes :*” but whatever the law might be formerly, it is now clear, as Lord Coke observes, that if it be born alive it is sufficient though it be not heard to cry ; for crying was only thought requisite as a proof that it was alive, and it is not the only proof.

In general every man may be tenant by the curtesy, who may lawfully marry : but to this there are some exceptions. Persons attainted of felony or treason shall not be tenants by the curtesy ; for they being *extra legem positi*, and their persons forfeited to the king, they are thenceforth incapable of the benefit of our laws in general, and by consequence of this in particular, which intended

(1) This writ may be seen at length in Sir Matthew Hale's Hist. of the Common Law, p. 179.

to give the inheritance only to those who were capable of holding it for life. Also persons attainted in a *præmunire* are excluded from the benefit of this law, and aliens be they friends or enemies: and in these cases their title shall never commence, even for the benefit of the king; but the wife's estate shall be discharged of it for ever. (m) But if the alien be made denizen, or the person attainted pardoned, and have issue after, they may be tenants by the curtesy in respect to that issue born after, but not in respect of any issue born before. (n)

I shall conclude this head of estate by curtesy with the mention of four requisites to its constitution, enumerated by Lord Coke. 1st. Marriage, which must be a lawful one. 2d. That the wife be seised of the estate; and this, if the nature of the subject will admit, must be a seisin in deed or actual seisin, and not a mere seisin in law or implied possession. 3d. Issue which, as has been already said, must be born alive, and which likewise must be such issue as is capable of inheriting the mother's estate. And, 4th. The death of the wife, without which this estate cannot commence.

(m) See Bro. tit. Curtesy. 15. (n) 7 Rep. 25.  
Co. Litt. 391 a. and 3 Inst. 43.



## 3. Of tenant in dower.

## SECT. 36.

*Tenant in dower is, where a man is seised of certaine lands or tenements in fee simple, fee taile generall, or as heire in speciall taile, and taketh a wife and dieth, the wife after the decease of her husband shall be endowed of the third part of such lands and tenements as were her husband's during the coverture, to have and to hold to the same wife in severalty by metes and bounds for terme of her life, whether she hath issue by her husband or no, and of whatsoever age the wife be, so as she be past the age of nine years at the time of the death of her husband, for she must be above nine years old at the time of the decease of her husband, otherwise she shall not be endowed.*

Dower, as appears from this description, is that part of the husband's estate which comes to the wife upon the death of her husband, and which is called by foreign writers *doarium*, *dotarium*, or *dotalitium*, but by our lawyers somewhat improperly *dos*; for *dos* strictly means only the marriage portion, which the wife brings with her. Tacitus however, speaking of our German ancestors, (o) uses that word in a way which at first sight seems to bear some relation to modern practice. "*Dotem*" says he, "*non uxor marito sed uxori maritus af-*

*fert* :” but it appears from the context, that this was only a *donatio propter nuptias*, a present of cattle and other moveables. We must therefore look for the origin of dower in later times ; it seems to have come to us, with the rest of our law respecting real estates, from Normandy. (*p*) And the reason of its institution probably was, that when the owners of lands could not devise any part of them by will, nor even alien them without the consent of the lord of whom they were held, and when personal property was of very small amount, the widows even of wealthy men must have been frequently left in the severest distress, if the law had not thus provided for them.

At common law, if the husband was attainted of treason or felony, the wife lost her dower, because it was a condition annexed to all feuds that the feudatory should not commit such crimes. (*q*) Afterwards the stat. 1 Edw. VI. c. 12. ordained that in every case, where the husband was attainted of treason or felony, the wife should notwithstanding have her dower : but the stat. 5 Edw. VI. c. 11. repealed that act, so far as respects treason ; so that in that case, and that case alone, a woman loses her dower by\* the crime of her husband.

(*p*) Grand Customier, c. 101. Plowd. Com. 262.

(*q*) F. N. B. 352. Hale's ed.

## SECT. 37.

*And note that by the common law the wife shall have for her dower but the third part of the tenements which were her husband's during the espousals ; but by the custome of some county she shall have the halfe, and by the custome in some towne or borough she shall have the whole ; and in all these cases she shall be called tenant in dower.*

By the custom of Borough English, still remaining in some ancient boroughs, the widow has for dower the whole of her husband's tenements within the borough, which is called her freebench.

The custom of gavelkind, by which the father's land is divided equally among the sons, and which now prevails only in Kent, is supposed before the Conquest to have been the general custom of the realm, and even after the Conquest there is great reason to think that it prevailed in most socage lands, that is, in most free lands not holden by certain military service, called with us knight's service. Where this custom is established the widow has half her husband's land so long as she continues unmarried.

In land held by knight service, as now in all free-land, the widow's share was a third part ; one third being probably allowed for the performance of the

service, and the other two-thirds to be divided between the wife and the heir; and in this case the widow was to hold for life, because it was considered as a tenure which was to continue according to the tenor of the investiture, namely, for life.

Sections 38, 39, 40, and 41, describe two species of dower which are evidently of the same nature as dower in general; and only differ from each other in this, that one of them is an endowment of lands which belong to the husband, the other of such as his father agrees to settle on the marriage. The first is called dowment at the church door, and the second dowment *ex assensu patris*. They differ from dower at the common law in this, that the quantity of land which may be thus settled is not limited. But these kinds of dower, which in the time of Glanvil (r) were the most usual, are now fallen into total disuse, and like many other parts of our law subsist potentially but not in fact.

#### SECT. 42.

*And note that no wife shall be endowed ex assensu patris in forme aforesaid, but where her husband is sonne and heir apparent to his father. Quære, Of these two cases of dowment ad ostium ecclesiæ, &c. if the wife at the time of the death of her husband be not past the age of nine years, whether she shall have dower or no.*

(r) See Glanv. lib. 6. c. 1.

To determine this question is not very necessary; nor will it probably be ever judicially determined. Lord Coke however gives us his opinion that such dower is good, because the consent on the man's part takes away the exception to the woman's age. *Consensus tollit errorem*. He adds what is of rather more importance to know, because rather more likely to become a real subject of inquiry, that a jointure made either under or above the age of nine years, is unquestionably good.

#### SECT. 43.

*And note, that in all cases, where the certaintie appeareth what lands or tenements the wife shall have for her dower, there the wife may enter after the death of her husband without the assignement of any. But where the certainty appeares not, as to be endowed of the third part to have in severallty, or the moiety according to the custom to hold in severalltie, in such cases it behoveth that her dower be assigned unto her after the death of her husband, because it doth not appeare before assignment, what part of the lands or tenements she shall have for her dower.*

The assignment here spoken of is to be made by the heir within forty days from the death of his ancestor, during which time called the widow's quarantine, she has a right to reside in her husband's

capital mansion house, a privilege confirmed to her by Magna Charta, c. 7. The assignment must designate her third share of the land by metes and bounds, and seems to correspond to the investiture by which a feudal lord put his tenant into possession, or to the livery of seisin by which among us an estate of freehold is conveyed. Accordingly the widow holds her dower not of the chief lord of the fee, but immediately of the heir; and he, while services were performed, was obliged to perform them for the whole estate.

## SECT. 44.

*But if there be two joyntenants of certaine land in fee, and the one alieneth that which belongeth to him to another in fee who taketh a wife and after dieth; in this case the wife for her dower shall have the third part of the moitie, which her husband purchased to hold in common (as her part amounteth) with the heire of her husband and with the other jointenant which did not alien, for that in this case her dower cannot be assigned by metes and bounds.*

## SECT. 45.

*And it is to be understood that the wife shall not be endowed of lands or tenements which her husband holdeth joyntly with another at the time of his*

*death ; but where he holdeth in common otherwise it is as in the case next aforesaid.*

In what particulars joint-tenants differ from tenants in common will be shewn hereafter. At present it may be sufficient to observe that the peculiar characteristic of joint-tenancy is *jus accrescendi*, or the right of survivorship, which subsists among those who are joint-tenants of the same estate ; and by which if one of them die his share accrues to the rest, and does not descend to his heir. This right interrupts the right of the widow, and prevents her from having dower of any land of which her husband was at his death only a joint-tenant.

#### SECT. 46.

*And it is to be understood that if tenant in taile endoweth his wife at the church doore as is aforesaid, this shall little or nothing at all availe the wife, for that after the decease of her husband, the issue in taile may enter upon her possession ; and so may he in the reversion if there be no issue in taile then alive.*

#### SECT. 47.

*Also if a man scised in fee simple being within age endoweth his wife at the monasterie or church*

*doore and dieth, and his wife enter, in this case the heire of the husband may out her. But otherwise it is (as it seemeth) where the father is seised in fee, and the sonne within age endoweth his wife ex assensu patris the father then being of full age.*

In one of these cases the statute *de donis*, in the other the natural incapacity of a minor to alienate, renders the endowment totally ineffectual.

The three following sections may be passed over as relating entirely to dower *de la plus belle*, which was abolished by the stat. 12 Ch. II. c. 24. together with the other incidents and consequences of tenure in chivalry.

#### SECT. 51.

*And so you may see five kinds of dower, viz. dower by the common law, dower by the custome, dower ad ostium ecclesiæ, dower ex assensu patris, and dower de la plus beale.*

Of the five species of dower then dower at common law and dower by particular custom, such as dower in gavelkind and borough English, still continue; dower *ad ostium ecclesiæ* and dower *ex assensu patris* exist in law, but not in practice; and the fifth, as has been just said, is abolished.



## SECT. 52.

*And memorandum that in every case where a man taketh a wife seised of such an estate of tenements, &c. as the issue, which he hath by his wife may by possibility inherit the same tenements of such an estate as the wife hath as heire to the wife; in this case after the decease of the wife he shall have the same tenements by the curtesie of England, but otherwise not.*

## SECT. 53.

*And also in every case where a woman taketh a husband seised of such an estate in tenements, &c. so as by possibilitie it may happen that the wife may have issue by her husband, and that the same issue may by possibilitie inherit the same tenements of such an estate as the husband hath as heire to the husband of such tenements she shall have her dower, and otherwise not. For if tenements be given to a man and to the heires, which he shall beget of the bodie of his wife, in this case the wife hath nothing in the tenements and the husband hath an estate, but as donee in speciall taile; yet if the husband die without issue, the same wife shall be endowed of the same tenements, because the issue which she by possibility might have had by the same husband might have inherited the same tenements. But if the wife dyeth living her hus-*

*band, and after the husband taketh another wife and dieth ; his second wife shall not be endowed in this case for the reason expressed.*

These two sections need no explanation, and the two paragraphs which follow (in many editions) are erroneous additions to Littleton. I shall therefore proceed to consider shortly the nature of a jointure which in modern times has almost superseded even dower at common law.

By the common law, dower *ad ostium ecclesiæ* and dower *ex assensu patris* were the only kinds of settlement by which a woman could be barred of that dower to which by the general custom of the realm every wife is entitled. No other assignment or assurance of lands whether made by the husband either before or after marriage, or offered by his heir to the widow after her husband's death, could have that effect, even though it were expressly declared in the instrument of conveyance to be in full bar and satisfaction of dower. For the right to dower vested in the wife by the act of marriage and the husband's seisin of the lands. This right could not be divested but by a deed of release after coverture, or by fine during coverture. If no such release were made or could lawfully be made, it continued still in being, and if it still existed she had a legal remedy for the recovery of it. As to any estate settled by the husband or his wife after marriage in lieu and satisfac-

tion of dower, the law continues the same to this day. And if it were made before marriage, it was at common law no bar for two reasons:—1st, Because at the time of making it she had no title to dower, and therefore an estate made to her then could be no bar to a right which accrued afterwards; it being a maxim that no right can be barred before it accrues. (a) 2ndly, Because a right to a freehold cannot be barred by acceptance of a collateral satisfaction, (b) which last reason applies to the law as it now exists with respect to estates so settled by the husband after marriage.

But as the general power of alienation increased, many inconveniences were found to arise from this strictness with respect to dower, and therefore at length a statute was passed (stat. 27 Hen. VIII. c. 10.) whereby it is enacted that, “Whereas persons have purchased or have estate of lands and hereditaments made unto them and their wives, and to the heirs of the husband, or to the husband and wife and the heirs of their two bodies begotten, or to the heirs of one of their bodies begotten, or to the husband and wife for term of their lives, or for term of the life of the wife *for the jointure of the wife*, every woman having such jointure shall not claim any dower of the residue of the lands that were her husband’s. Provided that if any such woman be lawfully evicted from her jointure or any part thereof, such woman shall be endowed of as much of the residue

(a) Co. Litt. 36 b. 4 Rep. 1. b.

(b) 4 Rep. 1.

of her husband's tenements as the lands so evicted shall amount unto. Provided also that if any wife shall have lands assured to her after marriage in jointure, except the assurance be made by act of parliament, she may at her liberty after the death of her husband refuse the lands to her assured in jointure, and demand her dower according to common law."

To make a good jointure within this statute five things are to be regarded :—

First, The estate must take effect immediately from the death of the husband. Therefore if an estate be made to the husband for life, the remainder to J. S. for life, remainder to the wife for her jointure, this is no good jointure ; for the statute designed nothing as a satisfaction for dower but that which should come in the same place, and be of the same use : neither can it be made good by the death of J. S. in the lifetime of the husband ; for no interest, that is not equivalent to dower, can deprive the wife of dower by force of the statute.

Secondly, it must be for term of the wife's life or some greater estate.

With reference to this point an estate for the life of another or the lives of many other coexisting persons is considered as a less estate than an estate for the wife's own life, and cannot be a good

jointure. And the same reason excludes an estate for 100 or 1000 years either absolutely or upon condition if she so long live. For the life of the wife is a collateral circumstance which does not alter the nature of the estate, which is a chattel real, and therefore is considered a less estate than an estate for life of the wife. (c) But if an estate for life be limited to the wife for her own life *durante viduitate*, or any other condition depending on her own will, it is a good jointure ; for it is in her power to continue it during her life because it cannot determine but by her act.

Thirdly. It must be made to herself, and not to others in trust for her.

This rule, Lord Coke says, is so necessarily to be observed, that though the wife should assent to a jointure made in trust for her, yet it would not be good ; for the statute only bars the dower when the possession is executed in bar. But as the statute intended only to secure to the wife a competent provision, and to exclude her from claiming dower together with her settlement, it seems that a provision or settlement on the wife, though by way of trust, if in other respects it answers the intention of the statute, would be enforced in a court of equity.

(c) But such a jointure would not be enforced in equity. *Churchman v. Hervey*, Ambler, 335.

Fourthly. It must be in satisfaction of the whole dower, and regularly it should be so expressed.

The reason is that if it be in satisfaction of part only, it is uncertain for what part of her dower it is a compensation, and therefore it is void in the whole. Lord Coke (*d*) adds that it must be expressed or averred to be in satisfaction of her dower: but this does not seem by later determinations to have been thought requisite either within the words or intention of the statute.

Fifthly. It must be made before marriage. This the very words of the act of parliament require; and therefore if a jointure be made to a woman during coverture in satisfaction of dower, she may waive it after her husband's death; but if she enters and agrees thereto, she is concluded; for though a woman is not bound by any act when she is not at her own disposal, yet if she agrees to it when she is at liberty it is her own act, and she cannot avoid it.

If a jointure be made to a woman before coverture, and the husband and wife alien the lands charged with the jointure which they may do absolutely by fine, the wife shall not afterwards be endowed of any lands of her husband's, for since she quitted her claim to dower when she was at her

own disposal, she can claim nothing but her jointure, and that she has passed away by the fine. But if the jointure was made during coverture, and then she relinquished it by fine, yet she shall have dower of other lands; for the acceptance of a jointure during coverture is no bar of dower.

#### 4. Of mere Freeholds.

##### SECT. 56.

*Tenant for term of life is where a man letteth lands or tenements to another for term of the life of the lessee or for the terme of the life of another man. In this case the lessee is tenant for terme of life. But by common speech he which holdeth for term of his owne life is called tenant for terme of his life, and he which holdeth for terme of another's life is called tenant for terme of another man's life.*

From all the cases it appears that if the solemnities necessary to the creation of a freehold be used, the law favours the creation of that estate, and supposes that every estate which may last for life was intended to do so. If a man therefore leases lands to another without specifying the time, and makes livery of such lands, the grantee shall have them for his own life; but not if this construction may be injurious to third persons. Therefore if lessee for his own life make such a lease generally with livery, this the law construes to be an estate for the life of

the grantor only. (s) The same law is of a grant of things incorporeal, if a deed of grant be perfected. Nothing more is requisite to be observed on this section: but that as he who holds for another man's life is called tenant *pur autre vie*, so he for whose life he holds is called in legal phrase *cestuique vie*.

## SECT. 57.

*And it is to be understood that there is feoffor and feoffee, donor and donee, lessor and lessee. Feoffor is properly where a man enfeoffs another in any lands or tenements in fee simple; he which maketh the feoffment is called the feoffor, and he to whom the feoffment is made is called the feoffee. And the donor is properly where a man giveth certaine lands and tenements to another in taile; he which maketh the gift is called the donor, and he to whom the gift is made is called the donee. And the lessor is properly where a man letteth to another lands or tenements for terme of life or for terme of years, or to hold at will; he which maketh the lease is called the lessor, and he to whom the lease is made is called the lessee. And every one which hath an estate in any lands or tenements for term of his own or another man's life is called tenant of freehold, and none other of a lesser estate can have a freehold: but they of a greater estate*



*have a freehold ; for he in fee simple hath a freehold, and tenant in tail hath a freehold, &c.*

The terms donation and *donum*, which seem to have been introduced on the supposition of a gratuitous feudal donation are the words chiefly used in the stat. *de donis* with respect to an estate-tail. They are not however so appropriated to that signification but that donor and feoffor are often confounded. *Feoffatus* is used in that statute for a donee ; and “*do*,” Lord Coke tells us, is the aptest word of feoffment.

An estate for life, like an estate in fee simple or fee tail, must be created by livery of seisin. As by the feudal law according to some writers no feudal earldom or barony, that is no earldom or barony with territory and jurisdiction, could be created without the consent (perhaps they should rather say the presence) of the peers of the realm ; (a) so it appears that by the same feudal law no land could be granted in fee by the lord without the presence of the lord’s tenants who were *pares curiæ*, or as we call them the free suitors of the court baron. (o) It does not however appear to have been ever necessary with us that the witnesses to a livery of seisin should be actually freeholders of the manor, though it was

(s) Hotoman’s *Franco-Gallia*.  
c. 14. St. Amand’s *Essay*.

(t) See Corvini *J. Feud.* 108, 109.  
*Feud. lib.* 2. tit. 33.

and is still necessary to the efficacy of livery that it be in the presence of witnesses and upon the land, that being deemed sufficient to make it known to the *pares curiæ*, who, according to our old constitution, were to decide the right to the land, if the title came into question.

The end and design of this institution was notoriety ; (u) and it is of two kinds, livery in deed and

(u) The introduction of uses has been before adverted to. One of their most important consequences was the alteration caused by them in the mode of conveying freehold property. For conveyances to uses, whether we conceive them to have been adopted by religious bodies for the purpose of evading the statutes of mortmain, or by laymen during the wars between the Houses of York and Lancaster to preserve their estates from forfeiture, must necessarily have been secret transactions; because publicity would have defeated their object.

By the common law if a man had an estate for years only, this estate was capable of being enlarged to a freehold or an estate of inheritance by the operation of a conveyance called a *release*. It was therefore the practice to make a demise for a

year under which the lessee entered; and after entry the reversion was released to him with its superincumbent use; and thus came into practice the common conveyance at the present day by lease and release. When the statute of uses had identified the use with the possession, and had declared that the person to whose use the estate was held should be considered in actual possession, a change took place in this mode of conveyance which rendered it much less obvious to notice than before. It had been held previous to the statute that if one man bargained and sold land to another for money that the bargainor, without transferring the possession, was seised to the use of the person who paid the money. When therefore the statute of uses transferred the actual possession to the use, this mode of conveyance was said to operate without transmutation

livery in law. "A livery in deed," says Lord Coke, "is when the feoffor or lessor taketh the ring of the door, or a turf or twig off the land, and delivereth the same upon the land to the feoffee or lessee in the name of seisin." And it is usual to indorse a memorandum of this on the back of the conveyance. A livery in law is when the feoffor saith

of possession, in contradistinction to lease and release, and some other modes of conveyance in which the lessee or grantee was supposed to have the actual possession transferred to him before the use could be executed in *cestui que use*. The convenience and advantage of this doctrine with reference to the conveyance by lease and release were readily seen; and the lease for a year, upon which the release was intended to operate, was thenceforward made by bargain and sale for a nominal consideration; and the use immediately arising to the lessee being by the statute of uses reduced into an actual possession, was considered as valid and effectual for the purposes of a release as actual entry under a lease at common law.

The conveyance however by lease and release, although it undoubtedly possesses great advantages, by no means comes in the stead or has all the powerful pro-

perties of a feoffment. By lease and release nothing passes but what the grantor may lawfully grant, although the express purport of the conveyance may be and the words made use of may suffice to convey a larger interest. But a feoffment from the notoriety of livery, more perhaps in ancient times than now, carries with it a strong probability that the feoffor had a rightful title to all that he professed to grant. Hence a feoffment has always been admitted to have the highest possible authority, and even where the feoffor has no title, it gives the feoffee a clear indefeasible estate against all the world but the rightful owner.

A bargain and sale is a more direct mode of conveyance than lease and release: but it is provided by stat. 27 Hen. 8. c. 16. (statute of inrolments) that all bargains and sales of the freehold shall be inrolled within six months from their execution.—EDITOR.

to the feoffee, being in view of the house or land, "I give you yonder land, enter and take possession." These two kinds are both copied exactly from the feudal law. "*Sciendum est feudum acquiri investiturá, ut si dominus alicui coram paribus curiæ dixerit, Vade in possessionem illius fundi, et teneas illum pro feudo.*" (x)

Till the stat. 29 Ch. II. c. 3. required a writing signed for the conveyance of any interest in land exceeding three years, a livery in law followed by the entry of the donee would have been a sufficient conveyance either of a freehold or an estate of inheritance according to the words used, without any deed or writing whatsoever, in like manner as by the feudal law *majoris roboris et efficacisë est investitura quæ coram convassallis et paribus curiis fit, etiam sine scripturá, quam quæ in eorum non fit præsentia licet scriptura intercesserit.* (y)

Since from the nature of estates *pur auter vie*, the life of tenant *pur auter vie* may terminate before that of *cestui que vie*, it remains to be considered how the law disposes of the surplus where such an event takes place.

By a feudal rule, which has been adopted by our law, no land which has been once appropriated can become vacant by the loss of its owner,

(x) Feud. lib. 4. tit. 36.

(y) Craig. lib. 2. tit. 2. s. 13.

since it passes immediately to some person designated by the law. On the death of the ancestor, his estate descends to the heir ; and if tenant in fee simple dies without heirs, the land will return to the lord of whom it is holden, and whose ancestor originally granted it.

To this general rule our law long admitted one exception, namely, with respect to estates *pur auter vie*. For if Marcus granted to Titius for the life of Caius, and Titius died in the lifetime of Caius, any one who could first get possession of the land on the death of Titius might by the common law have kept it as long as Caius lived by the right of occupancy merely. (z) For neither the lessor nor

(z) The methods by which property in lands may be naturally acquired are either original or derivative. Original acquisition is that by which the land before belonging to no man begins to be the property of some individual. Derivative acquisition is that by which the right of property already established passes from one person to another. Barbeyrac on Grot. de jure belli et pacis, lib. 2. c. 3. s. 1. n. 1.

Grotius, in the passage to which reference has just been made, says that original acquisition can now only be made by first occupancy, though while mankind were few in number it might also have

been by express division ; meaning undoubtedly as Puffendorf (De Jur. Nat. et Gent. lib. 4. c. 6. s. 2.) explains him, that when men first began to separate into families, distinct dominion or property was often settled by division ; and that in later times he is said originally to acquire a thing before vacant, who first seizes or lays hold of it. But it is obvious that such express divisions of which it must be owned there are traces in Holy Writ, and in the first accounts of most countries, could only be regulations concerning the mode of taking possession ; and the right still accrued either to the individual or the multitude by first

any one to whom he had granted the reversion could claim it, because he had parted with it during the life of Caius. The heirs of Titius could not claim it because they were not included in the words of the donation neither could the executors or administrators of Titius claim it, because it was an estate of freehold.

This was therefore *casus omissus*, a case unprovided for by positive law, and therefore left to the decision of the law of nature. In like manner and for the like reasons, if the lease had been granted to Titius for his own life, and he conveyed all his right to Caius, now Caius became tenant *pur auter vie*, and if he died during the life of Titius, the possession was in this case as in the former vacant, and therefore open to the first occupant.

A first occupant is defined by Puffendorf to be he who first takes *bodily possession* of any thing with an intention to keep it as his own. “ *Qui primus corporaliter apprehendit animo sibi ha-*

occupancy only. We may therefore conclude with the Roman lawyers that property began, as it still may begin, by seizure or taking possession. *Dominium rerum ex naturali possessione cæpisse*. Dig. lib. 1. tit. 2. The acquisition of land by first occupancy can seldom how-

ever be made in civil society where inheritances, testaments, and other modes of succession, are established; and still seldom under a feudal government where such things as might by the civil law be esteemed *bona vacantia* belong either to the king or the lord of the manor.

*bendi.*" (a) Accordingly our law, which in the case now under consideration merely followed the law of nature, required both an actual possession and an intention of keeping in order to vest any right in the occupant. If therefore a hunter riding over the land in pursuit of his game happened to be the first who had entered after the death of tenant *pur auter vie*, this casual entry which left no marks of appropriation, and was without any intention of keeping possession, could never produce any right. On the other hand a claim without an entry made no man an occupant, because notwithstanding the claim the possession was still vacant. (b)

As moreover actual or bodily possession was necessary to the existence of this estate, it is evident that of things which cannot be so actually possessed there could be no first occupant. Therefore rents, advowsons, rights of common, and all other incorporeal hereditaments which exist only by social compact, and owe their very being to positive institutions, were always incapable of occupancy; and if an estate of this kind were granted to A. during the life of B., and A. died before B. the lease for life was and still is thereby determined; and the estate must revert to the lessor not by the express terms of the deed, for according to that his claim would not commence till the death of B., but because no one else has

(a) Puff. de J. Nat. et Gent. lib.

(b) Vaugh. 188.

any right, and the subject will not admit of any actual entry nor consequently of any occupancy. (c)

In order to prevent an estate from passing by this kind of occupancy to one whom neither the lessor nor lessee could possibly intend to benefit by the lease, it is recommended by Lord Coke (d) and was not unusual, to grant an estate *pur auter vie* to the lessee and his heirs. In this case if the lessee or tenant *pur auter vie* died in the life of *cestui que vie*, the heir succeeded to the estate not properly as an inheritance, for that implies a possibility at least of perpetual duration, nor even as a descendible life estate or freehold, for the term descent is applicable only to estates of inheritance strictly so called ; but the heir succeeded, and in similar cases may still succeed as being specially appointed to occupy the otherwise vacant estate in contradistinction to such a casual uncertain possessor as has been before described who was termed a general occupant. The heir on the other hand thus succeeding by special designation is called in law a special occupant. But as this only remedied the evil in particular cases, where there was foresight and skill to provide against it, it was thought proper to ascertain the right to such vacant possession by a general law. And it was therefore enacted by stat. 29 Ch. II. c. 3. s. 12. that any estate *pur auter vie* might be devised by the

(c) Vaugh. 199.

(d) Co. Litt. 41.



party in the way prescribed for devising freehold estates of inheritance ; and if no such devise should be made, the same should be chargeable in the hands of the heir, if it should come to him by reason of special occupancy as assets by descent, that is, for the payment of specialty debts to which all descendible estates of inheritance were before liable in the hands of the heir; and in case there should be no special occupant that it should go to the executors or administrators, and be assets in the hands for payment of the general debts of the deceased.

This sufficiently secured these remnants of life estates from general occupancy : but still if there was no special occupant appointed by the lease, and the estate came by means of this statute to the hands of the executor or administrator of the deceased lessee, though he was compellable to apply it towards the payment of the debts generally of the deceased, he could not be obliged to pay any legacies out of it excepting such as were expressly directed by will to be so paid, nor was he under any necessity to distribute the surplus among the next of kin of the deceased till it was further enacted by stat. 14 Geo. 2. c. 20. s. 9. that it should be distributed in the same manner as the personal estate of the testator or intestate. This estate therefore is now the connecting link between freehold estates and chattels real, the nature of which we are next to consider.

## CHAPTER IV.

## OF CHATTELS REAL.

That interest or estate which a man may have in external things was divided by the ancient Roman Law into *dominium*, *ususfructus* and *usus*.

*Dominium*, or property, is the perfect controul over any thing capable of possession ; the absolute right of disposing of it,\* conformably to the rules of law; or, as Craig expresses it in the words of Bartolus, “ *Jus de re corporali perfectè disponendi nisi quis a lege vel judice prohibeatur.*” (a) Agreeably to which it is said in the digest “ *totum meum esse cujus non potest ulla pars dici alterius esse.* (b)

*Ususfructus* is a right to make all the use and profit of a thing that can be made without injuring the substance of the thing itself. *Ususfructus est jus alienis rebus utendi, salvâ rerum*

(a) Craig J. Feud. lib. 1. tit.

(b) Dig. lib. 50. tit. 26. leg. 25.

9. s. 7.

*substantia.* (c) This estate regularly lasted for life, though it might be constituted for a shorter time; and he who enjoyed it had as incident thereto the power of assigning his interest to another, or of letting it for any term of less duration.

*Usus* was only the right of using a thing as much as the present and personal wants of the possessor might require. *Minus juris est in usu quam in usufructu*, says Justinian, *nam is qui fundi nudum habet usum nihil ulterius habere intelligitur quam ut oleribus, pomis, floribus, fæno, stramentis et lignis ad usum quotidianum utatur.* (d) And this right which was of very limited duration could not be let out or transferred. (e)

Bartolus and the civilians of his school, in order to express the different degrees of property which subsisted in the original owner of an estate and an hereditary tenant or *emphyteuta*, divided *dominium* into *dominium directum* or superior property, which remains with the lord as long as he continues in any sense lord of the estate, and *dominium utile* which is enjoyed by the *emphyteuta* or the perpetual possessor. (f)

Now to apply this division of interest to our own distribution of real estates; he who is lord of

(c) Dig. lib. 7. tit. 1. l. 1.

7. tit. 8. l. 11.

(d) Inst. lib. 2. tit. 5. par. 1.

(f) See Tayl. Elem. of the

(e) Inst. ubi supra. Dig. lib.

Civil Law, 478.

the fee has *dominium directum*, the sovereign property ; tenant in fee simple or fee tail has *dominium utile* ; or, according to Cujacius and others, who do not approve of this division of *dominium*, he has an improper or hereditary usufruct. Tenant for life is strictly and properly an usufructuary : tenant for years has an inferior kind of usufruct limited as to time ; and tenant at will has something more than *usus*, and less than *usufructus*, agreeing with the *usufructuarius* in this, that he can take the profits not only for his own use, but for sale ; yet like the *usuarius*, he is restrained from letting or assigning his interest to another by the penalty of forfeiting his estate *ipso facto*. But neither tenant for years nor tenant at will has any property in the land, nor even in the eye of the law the possession *nomine proprio*. They are considered only as the bailiffs or agents of the landlord ; and if the landlord be evicted of the freehold by one who has a better title, the lessee must follow the fate of his lessor, having only, if he is lessee for years, an action of covenant to recover damages for the breach of that contract express or implied by which the lessor was bound to secure to him the enjoyment of land during his term. For this reason it is chiefly that an estate for years upon the death of the tenant does not descend to his heir according to the feudal rules of inheritance which were mentioned in treating of fee simple, but goes like chattels personal, and for the same purposes to the executor or administrator of the deceased.

Another reason which has been assigned for the inferiority of leases for years to life estates is that “anciently no lease could be made for more than forty years.” This Lord Coke (g) mentions with some qualification on the authority of Andrew Horne, author of the *Mirroure of Justices*, who in one place asserts it to be law that no one should grant or take a lease for years of longer duration, and in another complains of it as an abuse that leases were let for longer terms whereby inheritances were endangered through length of time and continuance of possession in the lessees. (h) But there is some reason to suspect that this was rather what Horne thought should be law, than what really was so. For besides that he is by no means one of the most accurate of our ancient writers and besides the instances (i) of long leases subsisting at least as early as the reign of Edward the Third, which is not long after the time of Horne ; there is a passage in Bracton, a writer of greater authority as well as antiquity, from which it may fairly be inferred that he was not acquainted with any such law since he supposes that a lease may be made for a very long term exceeding the age of man ; and concludes, agreeably to modern opinions, that an estate which is to last for life, and of which therefore the duration is uncertain, is of a higher nature than any lease however long the determination of which is prefixed. “ *Si fiat donatio ad*

(g) Co. Litt. 45. b.

27. &amp; ch. 5. s. 1. p. 83.

(h) *Mirroure of Just.* ch. 2. s.

(i) 2 Bl. Com. ch. 9.

*terminum annorum quamvis longissimum qui excedat vitas hominum, tamen ex hoc non habebit donatorius liberum tenementum cum terminus annorum certus sit ac determinatus, et terminus vitæ incertus, et quia licet nihil certius sit morte, nihil tamen incertius horâ mortis.” (k)*

This however is certain, that at common law the right of the lessee for years not only depended on the right of the lessor, to whom the freehold belonged, but was even liable to be defeated by collusive recoveries of the freehold between the lessor and a stranger, who by setting up a false title to the freehold was permitted by the lessor to recover the freehold, and thus consequentially defeat the right of the lessee. To remedy this evil an insufficient attempt had been made by the stat. of Gloucester, 6 Edw. I. c. 11. : but it was finally redressed by the stat. 21 Hen. VIII. c. 15. which gave the lessee the power of falsifying all untrue and collusive recoveries of the freehold.

From all this it appears that a lease for years, as it concerns lands, tenements, and hereditaments, may be regularly considered as real estate : but as it cannot descend to the heir, and in most other respects partakes of the nature of personal property, it is denominated a chattel, a term which was used in the old Norman law (*l*) to denote any moveable

(k) Bract. fo. 27.

Dufresne Gloss. voc. *Catallum*.

(l) Grand Customier, c. 87.

or personal property in opposition to fief, and which with us also signifies every estate which is not freehold, or as Sir H. Spelman expresses it, "*catalla dicuntur in jure nostro omnia bona mobilia et immobilia quæ nec feoda sunt nec libera tenementa.*" (m) Chattels then being either real or personal, every real estate which is on any account less permanent than an estate for life is a chattel real.

Littleton's description of an estate or tenancy for years is as follows :

#### SECT. 58.

*Tenant for terme of years is where a man letteth lands or tenements to another for terme of certain yeares after the number of yeares that is accorded between the lessor and the lessee. And when the lessee entreth by force of the lease, then is he tenant for terme of years ; and if the lessor in such case reserve to himselfe a yearely rent upon such lease, he may chuse for to distraine for the rent in the tenements letten, or else he may have an action of debt for the arrearages against the lessee. But in such case it behooveth, that the lessor be seised in the same tenements at the time of his lease ; for it is a good plea for the lessee to say that the lessor had nothing in the tenements at the time of the lease, except the lease be made by deed indented, in which case such plea lieth not for the lessee to plead.*

(m) Spelm. Gloss. voc. *Catalla*.

The expression used by Littleton is not tenant for years, but tenant for term of years ; which word “ term,” in its legal signification, denotes not merely the limitation of time, but the interest that is granted for that time.

“ Lands and tenements” are the only words used by our author to express the subject matter : but the power of leasing or granting the temporary use of property is not confined to them, but all things of the nature of tenements and hereditaments are subject to some few exceptions, and even chattels personal may be leased for years or at will. But these last do not strictly come under this head, because contracts concerning them cannot be considered as chattels real.

#### SECT. 59.

*And it is to be understood that in a lease for yeares by deed or without deed there needs no livery of seisin to be made to the lessee, but he may enter where he will by force of the same lease. But of feoffments made in the country, or gifts in tail, or lease for terme of life ; in such cases where a freehold shall pass if it be by deed or without deed, it behoveth to have livery of seisin.*

When Littleton wrote not only a lease for any number of years, but a gift in fee simple, fee tail, or for life, might have been made without writing ;



and this seems to have been the case all over Europe during the ages of Gothic rudeness. The common law continued with us as it stood in the time of Littleton till the reign of Charles the Second, when the total abolition of feudal tenure having removed every restraint on alienation, there was consequently the greatest scope and opportunity for fraud ; and writing being come into general use, the law which required it in matters of importance, could not be thought to impose any great hardship. It was therefore enacted by stat. 29 Ch. II. c. 3., commonly called the Statute of Frauds, “ that all leases, estates of freehold, or terms of years, or any uncertain interest in any lands, tenements, or hereditaments, made by livery and seisin only, or by parol, and not put in writing and signed by the parties making the same, or their agents thereunto lawfully authorised by writing, should have the force and effect of leases at will only, and should not either in law or equity be taken to have any greater effect.” The second section excepted cases not exceeding the term of three years from the making, whereupon the rent reserved should amount unto two-third parts at least of the improved value of the thing demised. (*m*)

(*m*) With respect to this statute it may be observed, that another species of tenancy has in more recent times superseded the old tenancy at will. At the present day, if a man lets generally

reserving a rent, and the lessee enters generally, there is a presumption in law that the intention is, that the lessee shall enjoy for a year certain subject to a determination of the tenancy at

It may be proper here to consider by what form of words a lease may be made ; and the rather because, as Littleton informs us, the words themselves constitute the conveyance without any formal delivery of possession or other such solemnity. It may be laid down then for a rule, that whatever words are sufficient to explain the intent of the parties, that the one shall divest himself of the possession, and the other come into it for a certain determinate time, are of themselves sufficient, and will in construction of law amount to a lease for years as effectually as if the most proper and pertinent words had been made use of for that purpose. On the contrary, if the proper and most authentic words whereby to describe and pass a present lease for years be made use of, yet if upon the whole instrument there appears no such intent, but that it is preparatory only to a future lease, the law will

the end of the year upon half a year's notice to quit ; but if no such notice is given, the tenancy will continue till the ensuing year, and after the commencement of the second year it cannot be determined till the end of such ensuing year on half a year's previous notice. This species of tenancy the courts are inclined to favour rather than the old tenancy at will. It is known by the name of tenancy from year to year, and is in effect a tenancy for a term of years : for

prospectively it is for a year certain, and retrospectively after the first year it is a tenancy for a term of years in the strict sense of the expression. It has been accordingly determined that the effect of the Statute of Frauds is to convert all such leases as are contrary to the statute into a tenancy from year to year, the intention of the statute being construed to be merely, that such leases should not have the effect of creating a term. (*Clayton v. Blakey*, 8 T. R. 3.)—EDITOR.

rather do violence to the words, than break through the intent : for a lease for years being nothing more than a contract for the possession and profits of the land on one side, and a recompence of rent or other income on the other, if the words made use of are sufficient to prove such a contract, in what form soever they are introduced, the law calls in the intent of the parties, and models and governs the words accordingly.

Lord Coke tells us that the proper words are demise, grant, betake, and to farm let, and that whatever other words amount to a grant may serve for a lease for years. (n) So in another place, (o) he says “ *dedi* ” is a sufficient word to make a lease for years. But there are many other words which are sufficient for the purpose.

#### SECT. 60.

*But if a man letteth lands or tenements by deed, or without deed for terme of years, the remainder over to another for life or in tail or in fee ; in this case it behooveth that the lessor maketh livery of seisin to the lessee for years, otherwise nothing passeth to them in the remainder, although that the lessee enter into the tenements. And if the termour in this case entreth before any livery of seisin made to him, then is the freehold and also the reversion*

(n) Co. Litt. 45. b.

(o) Co. Litt. 301. b.

*in the lessor : but if he maketh liverie of seisin to the lessee, then is the freehold together with the fee to them in remainder, according to the form of the grant and will of the lessor.*

Here it appears that there are some cases in which livery of seisin ought to be made to the lessee for years ; not for his own interest or safety, for, as we have seen, it is neither necessary nor of advantage to him, but for the sake of another who is to succeed him, and to whom an estate for life or some greater estate is granted, to commence at the expiration of his estate for years. For the rules of law require that at the creation of an estate of freehold seisin be actually delivered ; now it cannot in this case be delivered to the remainderman as he is called, because that would be to give him the immediate possession which belongs to the lessee, who by his lease has an exclusive right to enter on the land. The livery therefore must be made to the lessee himself, who is supposed to receive it as the attorney or substitute of the remainderman in whom the freehold is thereby vested ; and this supposition is the rather allowed, because it may be presumed that every man will accept that which is for his benefit, and because no other attorney can be appointed for this purpose, since the delivery of seisin to any other man would be no less injurious to the lessee than if it were delivered to the remainderman himself.

But, as Littleton informs us, if in this lease the termor or lessee enter into possession by virtue of his lease before any such livery of seisin was made to him for the benefit of the "remainderman," "then is the freehold and the reversion in the lessor," that is to say, any subsequent livery is void, and the grant of the freehold in remainder is consequently ineffectual. The reason of which is, that although the possession which the lessee has is in some sense *vicarious*, and enjoyed *nomine alieno*, yet still it is an actual possession; and no man can actually receive that from another of which he has already the actual possession; not to mention that as livery of seisin made to a man who was already in possession by a lease would have less attracted the notice of his neighbours, it consequently would have had less of that public notoriety, for the sake of which the ceremony of investiture was first instituted.

#### SECT. 61.

*And if a man will make a feoffement by deed or without deed, of lands or tenements which he hath in divers townes in one countie, the livery of seisin made in one parcell of the tenements in one towne in the name of all the rest, is sufficient for all other the lands and tenements comprehended within the same feoffement in all other the townes in the same countie. But if a man maketh a deed of feoffement of lands or tenements in divers counties,*

*there it behoveth in every county to have a livery of seisin.*

By the feudal law, as I have before had occasion to observe, it was necessary that livery of seisin, called by feudal lawyers *investiture*, should be made *coram paribus curiæ* before the *convassalli* or fellow-tenants of the same lord. The reason why this is not required with us, though at the same time it is necessary that livery should be made of some part of the lands conveyed lying within *the same county*, may perhaps be learnt from a little attention to our ancient juridical constitution of which the traces are still very visible. Every man who held free land not immediately of the king, but of any intermediate lord of a manor, was formerly always impleaded, as he still may be in the court baron of the manor in any suit respecting that land. So the lords of manors themselves, and all who held *in capite*, that is immediately of the crown, sued each other in the court of their common superior, the king, namely, in the county court; at which likewise it became necessary in process of time for all freeholders to attend; chiefly I suppose because this is a court of appeal to which complaints concerning either real or personal property might be removed from the inferior courts of manors. The establishment of the superior courts at Westminster, the institution of circuits, and many other causes, having reduced this court to a very low state, it has now seldom any great concourse of freeholders, unless

for the election of knights of the shire and coroners : but as they used anciently to meet there, and still are supposed to meet once a month for the distribution of justice, it was reasonable to consider the public transfer of possession made in any part of the county as sufficiently notorious to all the rest.

#### SECT. 62.

*And in some case a man shall have by the grant of another a fee simple, fee tail, or freehold without livery of seisin. As if there be two men and each of them is seised of one quantitie of land in one countie, and the one granteth his land to the other in exchange for the land which the other hath, and in like manner the other granteth his land to the first grantor in exchange for the land which the first grantor hath ; in this case each may enter into the other's lands so put in exchange without any livery of seisin : and such exchange made by paroll of tenements within the same county without writing is good enough.*

#### SECT. 63.

*And if the lands or tenements be in divers counties, viz. that which the one hath in one county and that which the other hath in another county, there it behoveth to have a deed indented betweene them of this exchange.*

The digression which our author makes in these two sections, and those which immediately follow, is on a subject which does not require much elucidation. The exchange of lands, which Sir Edward Coke informs us was once a very common mode of conveyance, and which appears to have been so from the many cases concerning it in the Year Books, and in the Abridgement of Fitzherbert and Rolle, is now become very unusual, because commerce and paper credit have so much increased the circulation of money that every wealthy purchaser may pay for what he buys either in current coin, or in securities equally current.

As however it still exists in law, and may sometimes be put in practice, it is proper to remark, first, that the term *exchange* is so appropriated by law to this use, that no other word or combination of words is allowed to be equivalent; secondly, that no such exchange can now be made by *parol*, a writing being in all cases necessary to the conveyance of a freehold by the statute of frauds. And, thirdly, that the exchange is not complete till that writing has been followed by the entry of each party into his respective purchase; so that entry seems in this case in some measure to supply the place of livery of seisin.



## SECT. 64.

*And note, that in exchanges it behooveth that the estates which both parties have in the lands so exchanged be equall; for if the one willeth and grant that the other shall have his land in fee taile for the land which he hath of the grant of the other in fee simple, although that the other agree to this, yet this exchange is voide because the estates be not equall.*

## SECT. 65.

*In the same manner it is, where it is granted and agreed betweene them, that the one shall have in the one land fee taile, and the other in the other land but for terme of life; or if the one shall have in the one land fee taile generall, and the other in the other land fee taile especiaall, &c. So alwaies it behoveth that in exchange the estates of both parties be equall, viz. if the one hath a fee simple in the one land, that the other shall have the like estate in the other land; and if the one hath fee taile in the one land, the other ought to have the like estate in the other land, &c. and so of other estates. But it is nothing to charge of the equal value of the lands, for albeit that the land of the one be of a farre greater value than the land of the other, this is nothing to the purpose so as the*

*estates made by the exchange be equall. And so in an exchange there be two grants, for each party granteth his land to the other in exchange, &c. and in each of their grants mention shall be made of the exchange.*

It is almost needless to observe that the word estate is here used in its strict and legal sense, for the quantity or continuance of interest; and that therefore the equality required in exchange is only equality of duration: this appears sufficiently from the instances given by Littleton; and the reason I apprehend why equality of value is not necessary to the validity of an exchange is, that provided the ceremonies be observed, which are required to the solemnity of a conveyance, the law examines not the sufficiency of the consideration. A court of equity will indeed, in some cases, enter into an examination of this kind: but those cases are exceptions to the general rule of law, and *exceptio probat de non exceptis*.

#### SECT. 66.

*Also if a man letteth land to another for term of yeares, albeit the lessor dieth before the lessee entereth into the tenements, yet he may enter into the same tenements after the death of the lessor, because the lessee by force of the lease hath right presently to have the tenements according to the forme of the lease. But if a man maketh a deed*

*of feoffment to another, and a letter of attorney to one to deliver to him seisin by force of the same deed ; yet if livery of seisin be not executed in the life of him which made the deed, this availeth nothing, for that the other had nought to have the tenements according to the purport of the said deed before livery of seisin made ; and if there be no livery of seisin, then after the decease of him who made the deed the right of these tenements is forthwith in his heire, or in some other.*

Though the words of a lease constitute the conveyance without any formal delivery of possession, it must not thence be inferred that possession is in no way requisite to the completion or perfection of that conveyance : for although the lessor hath done all on his part to perfect the contract, so that he cannot afterwards derogate from it, or avoid it ; yet till the entry of the lessee it seems to want the chief mark of his consent thereto, without which it would be unreasonable to adjudge him in possession to all intents and purposes, since it may happen that the lease was made without his concurrence, and is such as he would not accept. But the difference which our author here meant to exemplify between the conveyance of a freehold and the grant of a chattel real is this, that in the common law conveyance of a freehold by feoffment and livery of seisin, the livery is of the very essence of the transfer, without which the deed of feoffment is totally ineffectual ; whereas in the case of a lease, as soon as

ever the contract is made the lessor has done all on his part to divest himself of the possession and transfer it to the lessee ; and he has in fact transferred such an interest to the lessee as he may at any time reduce into possession by an entry, as well after the death of the lessor as before, and such as he may before entry grant over to another ; or if he die before entry, it will go to his executors in the same manner as if it had been reduced into possession.

## SECT. 67.

*Also if tenements be let to a man for term of half a year, or for a quarter of a yeare, &c. in this case if the lessee commit wast, the lessor shall have a writ of waste against him, and the writ shall say quod tenet ad terminum annorum : but he shall have an especiall declaration upon the truth of his matter, and the count shall not abate the writ because he cannot have any other writ upon the matter.*

As the term estate for years is the technical and legal name for any estate, the duration of which is limited by any certain time, therefore an estate for half a year coming within the same definition must have the same legal name, though it cannot with any propriety be called so in common speech.

Every suit begins with a writ, which very\* shortly

sets forth the cause of action, and the form of which has in some cases been settled by act of parliament, in others by usage and the authority of the courts. The declaration called sometimes the count, in Latin *narratio*, is an exposition or enlargement of the writ in which the plaintiff relates his story to the Court with the addition of time, place, and circumstances. The meaning of this section therefore is that in the case here put the writ being founded on the statute of Gloucester, c. 5, which gives the action of waste against a lessee for years, must strictly adhere to the words of that statute, and must say *quod tenet ad terminum annorum*: but the plaintiff in his special declaration or count must relate the fact truly that the land was demised to the defendant for half a year, and yet this seeming inconsistency between the writ and the declaration shall not abate the writ which is in other words to put an end to the suit.

I now proceed to speak shortly of tenant at will.

#### SECT. 68.

*Tenant at will is, where lands or tenements are let by one man to another, to have and to hold to him at the will of the lessor, by force of which lease the lessee is in possession. In this case the lessee is called tenant at will because he hath no certain nor sure estate, for the lessor may put him out at what time it pleaseth him. Yet if the lessee soweth*

*the land, and the lessor after it is sowne, and before the corne is ripe put him out, yet the lessee shall have the corne and shall have free entry egresse and regresse to cut and carrie away the corne, because he knew not at what time the lessor would enter upon him. Otherwise it is if tenant for yeares which knoweth the end of his terme doth sow the land, and his terme endeth before the corn is ripe. In this case the lessor or he in the reversion shall have the corne, because the lessee knew the certainty of his terme and when it would end.*

The corn which the ejected tenant at will hath thus a right to cut and take away is called in law the emblements; and his right to them is founded on a principle of natural equity, that he who, being lawfully in possession of land, sows corn with a just and reasonable hope of reaping it, ought not to be disappointed of that hope without his own fault; accordingly the right always depends on the circumstance that the tenant when he sowed the corn could not foresee that his term would expire when it did. If a tenant for years who knows that his lease is to end in June will notwithstanding sow corn, which cannot in the ordinary course of nature be ripe before August, he shall suffer for his folly: but if tenant for life sows corn, and dies before it is cut, his executors shall have the emblements, because the act of God, which has deprived him of life, could no more be foreseen than the tenant at will could foresee the determination of his estate.

## SECT. 69.

*Also if a house be letten to one to hold at will, by force whereof the lessee entreth into the house and brings his household stuff into the same, and after the lessor puts him out, yet he shall have free entrie egress and regresse into the said house by reasonable time to take away his goods and utensils. As if a man seised of a mere estate in fee simple, fee taile, or for life, hath certaine goods within the said house, and makes his executors and dieth; whosoever after his decease hath this house, his excutors shall have free entry egress and regresse to carrie out of the same house the goods of their testator by reasonable time.*

This right of entry for the particular purpose of carrying off the goods stands upon the same foundation as the law of emblements. And the reason why the ejected tenant at will and the executor of a tenant for life have this power, which in strictness of law tenant for years has not after the expiration of his term, is only because the duration of their estates is uncertain, that of the tenant for years is certain and predetermined. It must therefore be remembered that as every lease at will may be determined by the will of the lessee as well as by that of the lessor, if he by his own act puts an end to his estate, he cannot afterwards claim any right to emblements, or come upon the land to carry

off his goods ; though like tenant for years, if his goods are detained from him, he may bring an action to recover the possession of them.

## SECT. 70.

*Also if a man make a deed of feoffment to another of certaine lands, and delivereth to him the deed but not liverie of seisin ; in this case he to whom the deed is made, may enter into the land, and hold and occupy it at the will of him which made the deed, because it is proved by the words of the deed that it is his will that the other should have the land : but he which made the deed may put him out when he pleaseth.*

This resolution is agreeable to what has been already said of the nature of a feoffment, that without livery of seisin it is totally ineffectual, and conveys no kind of interest whatsoever ; for, strictly speaking, it does not even convey an estate at will : but as every one who takes possession of the land with the consent of the owner is tenant at will, the sealing of the deed of feoffment is evidence of that consent, and nothing more.

## SECT. 71.

*Also if a house be leased to hold at will, the lessee is not bound to sustain or repaire the house as tenant for terme of yeares is tyed. But if tenant at*



*will commit voluntary wast, as in pulling downe of houses or in felling of trees, it is said the lessor shall have an action of trespassse for this against the lessee. As if I lend to one my sheep to tathe his land, or my oxen to plow the land, and he killeth my cattell, I may well have an action of trespass against him notwithstanding the lending.*

### SECT. 72.

*Note if the lessor upon a lease at will reserve to him a yearly rent, he may distreine for the rent behinde, or have for this an action of debt at his owne election.*

Though, as I have before said, an estate at will may be determined by the lessee as well as the lessor when either of them chooses; yet, if the lessor reserves a rent, the lessee cannot by determining his will before the rent day avoid the necessity of payment.

If a tenant at will, therefore, rendering rent quarterly determine his will in the middle of a quarter, he must pay a quarter's rent; on the other hand if the lessor determine the will in the middle of a quarter, he must lose a quarter's rent. (a)

At the present day courts of justice, where the words of the contract will bear it, are always in-

(a) *Leighton v. Theed*, 1 Salk. 413. 1 Roll. Abr. 861.

clined to construe a lease to be a lease for years rather than a tenancy at will ; and the reservation of a rent at fixed periods of time is *primâ facie* evidence of a tenancy for years, or some aliquot part of a year : but it seems to be clear that such evidence may be rebutted by other circumstances, and that a tenancy at will strictly so called may exist now as well as formerly. (*b*)

(*b*) See *Legg v. Strudwick*, 2 Salk. 414.

## CHAPTER V.

## OF CUSTOMARY ESTATES.

The only kind of estates which remains to be considered is called a customary estate, the tenure of which depending upon local customs, originally arbitrary and sometimes capricious, is by its nature variable and circumscribed. Constituted at first by the mere will of the lord, and by degrees subsiding into something like prescriptive establishment, no other account can be given of it, but that it was of long continuance, which continuance of custom was allowed by degrees to have, as in many other cases, the force of a law. The origin and ground of its establishment are expressed in the legal definition of this kind of estates ; which are said to be held at th will of the lord according to the custom of the manor.

Under the feudal system the sovereign power was ramified into jurisdictions subordinate to each other ; and every district had a lord of its own, intrusted with the government of its little territory.

A grant of lands from the king, the supreme lord, in those times included not only a right of possession but a right of dominion, the baron, as he was then called, being enabled to erect a court, and to make laws for his dependents ; and his territory so regulated was called a manor. He to whom a tract of land was thus granted had likewise for some time the power of subdividing his possessions by subinfeudation, that is, by admitting others to hold of him as he held of the king by military service or by an inferior tenure called socage, of which the origin is not well known, but which seems calculated more for immediate profit than that by military service, as a rent or some certain recompence was always reserved to the lord. These secondary lords might again make grants of a similar kind ; so that manor grew from manor without any limitation. It was in time discovered that by this long series of subinfeudations the end of the original grant was less certainly produced than before. It was therefore provided by Magna Charta, c. 32. that no man should for the future dispose of more of his land than would leave it in his power to perform the services due to the lord of the fee. *Nullus liber homo det de cætero amplius alicui quam ut de residuo terræ possit sufficienter fieri domino feodi servitium ei debitum.* This was a general precept sufficient to explain the intention of the law, but not sufficient to enforce obedience ; for he that alienated his land was left to himself to judge of the quantity sufficient to perform his services, and

consequently his inability was frequently not discovered till his services were wanted. To remedy this inconvenience the stat. 18 Ed. I., called from its first words *Quia emptores terrarum*, was made, by which it was provided that the buyers of lands should hold them by the same services and of the same lord as they were before held by the seller. By this statute the power of subinfeudation or the power of increasing manors was totally abolished, because all land into whatever hands it fell must thenceforward have been held on the terms it was held before, and consequently appertain to the manor to which it formerly belonged.

A manor, like many other things well enough known, is not easily defined: but it may be considered generally as a district subject to the jurisdiction of a court baron, in which are generally comprised four kinds of property:—1. The demesne land, which was actually held by the lord in his own hands for the support of his family. 2. Freehold land, which comprises lands anciently granted for military service or in socage. 3. Copyhold or customary estates, which we are about to consider: and, lastly, Wastes or lands lying in common of which the soil belongs to the lord, but on which both the lord and the tenants may pasture their cattle.

The origin of copyhold estates is generally referred by lawyers to a base tenure called villenage.

A villain, from the Latin "*villanus*," was a man of servile condition, whose employment was to cultivate the lands of his lord, and who was considered as *glebæ affixus*, as a portion of the estate, to be bought or granted with the land on which he lived ; who might be seised if he fled from his residence, or claimed by a legal action if he was seduced and withheld. He was of so little account in the eye of the law, that the lord could not be sued by his villain, otherwise than by an appeal of rape or of the murder of his ancestor ; (a) because the law, at least tacitly, allowed the lord in every other respect to use his own property at his pleasure : neither was the lord driven to the necessity of bringing any action against his villain, because whenever he thought himself injured he had punishment or reparation in his own hands. This principle prevailed so strongly that the villain, against whom any suit was moved by his lord, was by such suit enfranchised, the lord by making use of the law being supposed to confess him free. (b)

What was the origin of this species of bondage, or how so great a number of men continued in a state so abject and miserable, it is not easy to discover through the mists of antiquity. It is probable that pure villenage existed in all the countries of Europe antecedent to conquest. (c) But in

(a) Litt. s. 189, 190.

(b) Litt. s. 208.

(c) See Montesq. Esprit de

Loix, liv. 30. c. 9, 10. and Ferrier Diction. de Droit. tit. Serf. After the Goths and Burgun-

the history of ancient times feuds and villains are so constantly found together that it is impossible not to suppose that there was something in the pri-

dians had under various pretences penetrated into the heart of the Empire, the Romans, in order to put a stop to their devastations, were obliged to provide for their subsistence. At first they allowed them corn, which they bound themselves to by treaties: but afterwards they chose to give them lands. The emperors or Roman magistrates made particular conventions with them concerning the division of lands. *Burgundiones partem Gallie occuparunt, terrasque cum Gallicis senatoribus dividerunt.* (Marius's Chron. A. D. 456.) This division was still subsisting in the time of Ludovicus Pius, as appears by his capitulary of the year 829, which has been inserted in the law of the Burgundians. tit. 79. s. 1. The Franks did not follow the same plan. In the Salic and Ripuarian laws we find not the least vestige of any such division of lands: they had conquered the country, and so took what they pleased, making no regulations but amongst themselves. They acted however with moderation, and did not strip the Romans of all their land: which may also be accounted for on another principle, namely, that they took

only as much as they wanted, and left the rest.

The law of the Burgundians (tit. 54. s. 1.) takes notice that when that people settled in Gaul, they were allowed two-thirds of the land, and one third of the slaves. In this it considered the genius of the two nations. As the Burgundians dealt chiefly in cattle, they wanted a great deal of land and few slaves; and the Romans from their application to agriculture had need of less land, and of a greater number of slaves. The woods were equally divided, because their wants were in this respect the same.

The inference which Montesquieu deduces from this circumstance is that pure villenage existed in that part of Gaul before it was invaded by the Burgundians. The law of the Burgundians (tit. 26. ss. 1, 2.) in points relating to the two nations makes a formal distinction in both between the nobles, the free born, and the slaves: so that slavery was not a thing peculiar to the Romans, nor liberty and nobility to the Barbarians. The same law (tit. 27.) says that if a Burgundian freeman had not given

mitive nature of feudal government, that tended to enslave the lower classes of the community. The progress of feuds may be traced backwards, till it exhibits all the appearances of an incipient polity, and shews a nation of savages newly reduced from lawless wildness to imperfect order and uncertain government. The first act of such a polity is appropriation of lands; a division of territory into *meum* and *tuum*. In the division of feudal property, however it was made, very little regard was shewn to philosophic notions of original equality. The chiefs, by whatever title they attained their authority, shared the land among them, and the benefits of nature were no longer common. When the accommodations of life were few, but few arts were necessary to produce them. One man was therefore less necessary to another than in later times, and the numerous wants and ready supplies by which the system of polished life is held together were not yet known in the

a particular sum to his master, nor received a third share of a Roman, he was always supposed to belong to his master's family. The Roman proprietor was therefore free, since he did not belong to another person's family; he was free because his third portion was a mark of liberty.

We need only open, adds Montesquieu, the Salic and Ri-

puarian laws to be satisfied that the Romans were no more in a state of slavery among the Franks, than among the other conquerors of Gaul. It appears therefore to be generally true that the French had their villains *glebæ affixos* without any of the tyranny of conquest. The same also might be easily shewn to have been the case with most of the other continental nations.—  
EDITOR.



world. Men held commerce with men but as givers and receivers ; and the products of the earth then passed immediately, if they passed at all, from him that raised to him that consumed them. He only was rich, who was the owner of land, and he that had no land was necessarily poor ; and the poverty of those days was not want of splendour but want of food.

Those who see the world in motion by the power of artificial riches, and receive all that the bounty of nature can give or the diligence of art can fabricate in exchange for gold and silver, who devour at every meal the product of every quarter of the globe, and even in the humblest habitation enjoy the labour of a thousand artificers, cannot easily conceive a state in which every man was sufficient for himself ; in which families then called opulent provided for themselves at home almost every thing which life was supposed to require. Yet this was undoubtedly the state of the first feudal communities. What then must have been the condition of the unhappy man that had no land unless he might be permitted to cultivate the land of another ? This permission too he must purchase on any terms which the lord of the district might prescribe. If it be objected, that land is of no use to the owner but as it is tilled, and that therefore he would willingly feed all that would labour, it must be remembered that as long as men are satisfied with the products of the earth, very little improved

by art or manufacture, many will be sustained by the labour of a few. A single shepherd can attend a numerous flock, a few ploughs will till a spacious farm : and as there was no commerce by which superfluities might be turned to profit, the lord could desire to raise no more than sufficient to sustain his family. As population therefore increased, the land was more necessary to the labourer than the labourer to the land. Many petitioned to be fed whose work was not wanted by him that fed them. They were therefore reduced to the hard choice of servitude or hunger ; and accepted small portions of land on the cruel terms of becoming in some sense the cattle of their lord, a property appendant to the soil by which they were sustained. This is the natural and therefore probably the true origin of villenage ; and such, with accidental differences of mode, will inevitably be the state of every country where lands are appropriated and arts are few.

Villenage, like all other conditions, had its distinctions and gradations. The villain service of some tenants was uncertain and arbitrary ; so that, as our old lawyers expressed it, they knew not at night the business of the morning, (*d*) *nec scire debeat sero quid facere debeat in crastino*. Others held by services known and certain, though of the lowest and basest kind, such as removing the dunghill and

(*d*) Bract. fo. 208. b. Britt. c. 31. Co. Litt. 116. b.

spreading it upon their lord's ground. (e) But there was likewise a middle state partaking to a certain degree of servitude and freedom; not villenage with respect to the person, but tenure in villenage or by villain service. A man in this respect was free with respect to his person; and though while he held his land he was bound to certain low services, yet these services were stipulated and settled, and he was always at liberty to leave his land and his servitude together. (f) To some of the villain tenants upon the king's lands belonged this privilege that they could not be ejected from their tenements, nor compelled to hold them longer than they were content with their condition. There were tenants who held in villenage of other lords, of whom we are told by Bracton, (g) that they were such as before the Conquest had possession of free-land: but being driven out by the violence of power were reduced to take their possession again upon such terms as the usurper granted.

As peace softened manners, and religion rectified opinions, the inequalities of life were gradually diminished, and the rigours of inferiority imperceptibly softened. That one Christian should be held in bondage by another was considered by the clergy as contrary to that mercy which religion dictates, and by lawyers as inconsistent with that justice which is the end of legal institutions. It is there-

(e) Litt. s. 172.

(g) Bratt. fol. 7.

f) Lit. s. 172.

fore probable that many villains were emancipated by the piety of their lords, and some enfranchised by subtilties of law. But as no man would willingly give up the profit of his estate, some method was to be found by which the tenant might be set at ease, and the interest of the lord not diminished. The villain might become a free-tenant in villenage, and the tenant in villenage rise to a copyholder. That this was the gradation by which base tenures came to their present state is very probable. Copyholds were known long before the time of Littleton, though tenure in villenage and villenage itself were still subsisting. But by degrees they died away, and the copyholder only remains amongst us, whom our author thus describes.

15.

*Tenant by copy of court roll is as if a man be seised of a manor within which manor there is a custome, which hath been used time out of minde of man, that certaine tenants within the same manor have used to have lands and tenements to hold to them and their heires in fee simple or fee taile, or for terme of life, &c. at the will of the lord according to the custome of the same manor.*

As copyholds are held according to the custom of the manor, and these customs are naturally various, under the denomination of copyhold very

different degrees of interest are comprehended. It is said by Lord Coke that copyholders may have a fee simple *secundum quod*, but not a fee simple *simpliciter*. A copyhold of inheritance does not include necessarily or generally all the incidents which inheritance in other cases supposes. It descends according to the rules of the common law relating to fee simples: but it is not subject for example to dower, nor can a husband hold by curtesy unless the particular custom of the manor warrant it. (*h*)

#### SECT. 74.

*And such a tenant may not alien his land by deed, for then the lord may enter as into a thing forfeited. But if he will alien his land to another, it behoveth him after the custome to surrender the tenements in Court, &c. into the hands of the lord to the use of him that shall have the estate in this forme or to this effect :—*

*A. of B. cometh into this Court and surrendereth in the same Court a mease, &c. into the hands of the lord to the use of C. of D. and his heires or the heires issuing of his body or for terme of life, &c. and upon that cometh the aforesaid C. of D. and taketh of the lord in the same courts the aforesaid mease, &c. To have and to hold to him and to his*

*heires, or to him and to his heires issuing of his body, or to him for terme of life at the lord's will after the custome of the manor to do and yield therefore the rents, services, and customes thereof before due and accustomed, &c. and giveth the lord for a fine, &c. and maketh unto the lord his fealty, &c.*

What shadow of dominion remains to the lord over lands held by copy of court-roll more than over any other tenements appears principally when such lands are to be transferred. The possessor of a copyhold is still supposed by the forms of law to have no more than what he had in the original institution, an estate permissive and precarious, of which he has only the present enjoyment, but not the property. He cannot therefore transfer the land directly from his own hand to that of another.

We may collect with sufficient certainty from our ancient formularies preserved by Madox (i) that during the full prevalence of the feudal system this was the state of all subinfeudations or subordinate tenures ; and that no man holding of a superior could convey any part of his lands to another but by making first a resignation to the original grantor. At least if by any artifice of law or want of cautious limitations in the original grant, or by

(i) *Formulare Anglicanum*, tit. Confirmation and Release.

any other means in the confusion and ignorance of those dark times, such conveyances were made, the lord was considered as injured in his rights: and his complaint will be thought not unreasonable when it is remembered that all subinfeudations were conditional; and that the grantor reserved to himself certain rights and services for which the land granted continued to be his security; and that therefore by transmission of the lands to a third proprietor unconnected with the lord the very purpose of the grant might often be defeated. The statute *quia emptores*, to which reference has already been made, took away the necessity of this intermediate process with respect to freehold lands by preserving to the original lord his ancient right, how often soever the land might change its owner. But over lands held at the will of the lord his power still continued.

The estate in copyhold lands was probably for a long time, if not absolutely at the pleasure of the lord, at most only during the life of the tenant; and when the sons of the tenant succeeded to their father, the original relation still subsisted between the family of the lord and that of the copyholder, and they were considered as possessing their land by favour and preference. While this consideration lasted, justice as well as law required that they should not give them over to strangers, or introduce into the territory of their lord such as he did not approve or could not trust. By degrees as descents

multiplied, and as manors often passed into other families, the personal relation between the tenant and lord totally disappeared, and nothing remained but the appurtenance of the tenement to the manor. Then it would regularly happen that the tenant claimed a prescriptive right, and that the law would support him in his claim. From that time the lord only retained the form of his ancient right; and though the land must still be surrendered into his hands, he has no longer the power of refusing to accept the surrender or retain the land; but he is become, as Lord Coke somewhat disrespectfully terms him, only an instrument to convey the land from one to another.

That this surrender of copyholds is only the last remnant of a more extensive practice, is rendered probable by the present mode of Scottish conveyances. In a case decided so lately as the year 1752 an heir, who after the death of his ancestor had not yet entered upon his patrimony, having procured from the lord of the fee a new grant of the inheritance, altering the course of succession, the judges of Scotland were of opinion that such a grant was ineffectual; for they held that the lord having by the original donation divested himself of the possession, could not till he was reinstated in that possession make any new grant, and that therefore the heir ought first to have been legally invested with the estate originally granted, then to have resigned that estate into the hands of the



superior ; and afterwards to have taken it back with such new limitations as might be devised. (*k*)

The law always supposes that a copyhold, when it is transferred from one proprietor to another, passes intermediately into the lord's hands. The lord obtains this fictitious possession in cases of sale by a surrender ; and if the possessor intends his lands after his death to pass out of the direct line of inheritance, he must surrender them to the use of his will. (*l*)

In case of descent, death itself is in the nature of a surrender : but because manor courts are not always accessible, the legal heir may not only claim admittance in the lord's court, but he may enter immediately upon his inheritance, may take the profits or sue for trespass ; and if he will may sell the land, always reserving to the lord the fine for admittance. For the land is always considered as a security for the lord's dues, who if the heir does not upon proclamation come to be admitted, may always seize the profits till he appears, and according to the custom of some manors may take the land as forfeited. The land so forfeited he might have once withheld : but the gradual mitigation of

(*k*) Dalrymple on Feudal Property, ch. 6. sect. 1. Forbes's Inst. Vol. I. Part 3. ch. 1. t. 1. sect. 1.

tween a devise in Scotland, and a devise of copyhold in England, in *Brodie v. Barry*, 2 Ves. & B. 133.

(*l*) See the analogy stated be-

feudal rigour, which has been so often alluded to, has now made it an established practice in the Court of Chancery to compel the lord to re-admit the owner upon tender of the fine.

So there are cases in which equity will supply the total omission of a surrender. As when a man sells his estate, and having received the price dies before he has surrendered, the court of Chancery will supply the defect, and compel the lord to admit the purchaser. (*n*) If a copyholder bequeath his tenement for payment of debts, this will shall be valid in equity without a surrender, unless his other effects be sufficient to satisfy his creditors. (*o*) If a copyhold be left to younger children, they shall not be excluded by the heir at law for want of a surrender, unless the will appear to be inequitable, and favours the younger children to the manifest injury of the heir. (*p*) But the want of a surrender will not be supplied in favour of an illegitimate child, because equity does not favour a relation which the law prohibits. (*r*) Upon grounds less evident it is now considered as settled, that the want of a surrender shall not be supplied in favour of a grandchild; although the case on which the doc-

(*n*) 1 Eq. Abr. 122. *Hansard v. Hardy*, 18 Ves. 462.

(*o*) 1 Eq. Abr. 123, 124.

(*p*) *Hardham v. Roberts*, 1 Vern. 132. *Bradley v. Bradley*, 2 Vern. 163. See *Hills v. Down-*

*ton*, 5 Ves. 557. and *Garn v. Garn*, 16 Ves. 268.

(*r*) 1 Eq. Abr. 123. *Fursaker v. Robinson*, Prec. Ch. 475. *Tudor v. Anson*, 2 Ves. 582.

trine rests has met with strong disapprobation. (s) Much less will it be done in favour of collateral relations. (t)

### SECT. 75.

*And these tenants are called tenants by copie of court roll, because they have no other evidence concerning their tenements but onely the copies of court rolles.*

### SECT. 76.

*And such tenants shall neither implead nor be impleaded for their tenements by the king's writ. But if they will impleade others for their tenements, they shall have a plaint entered in the lord's Court, in this forme or to this effect: A. of B. complains against C. of D. of a plea of land, viz. of one messuage, forty acres of land, four acres of meadow, &c. with the appurtenances, and makes protestation to follow this complaint in the nature of the king's writ of assise of mordancestor at the common law, or of an assise of novel disseisin or formedon in the descender at the common law, or in the na-*

(s) *Kettle v. Townsend*, 1 Salk. 187. See *Perry v. Whitehead*, 6 Ves. 544.

(t) *Sir L. Strode v. Lady Russell*, 2 Vern. 625. *Tudor v. Anson*, 2 Ves. 582. Now by stat. 55

Geo. III. c. 192. every disposition by will is good after the death of the copyholder, although no surrender shall have been made according to the custom to the uses of the will.—EDITOR.

*ture of any other writ, &c. Pledges to prosecute F. G. &c.*

The power of holding courts is necessarily incident to a manor. The court baron, to which reference is here made, is of two kinds ; one for deciding differences between the freeholders of the manor, of which the freeholders are the judges, and the steward is the register ; the other for examining the claims of the copyholders, of which the lord or his steward by deputation is both register and judge. The transactions of this Court are registered in a book kept by the steward, and called the court roll. In this the admission of every new tenant is entered according to the form given by Littleton in his 74th section ; of which entry he receives a transcript which is the legal evidence of his right.

The position of Littleton, that the tenant of a copyhold can neither plead nor be impleaded concerning his tenement but in his lord's Court, still continues speculatively true : but as the modes of process then in use have been found to be dilatory and expensive, a more compendious method of trying titles by the action of ejectment has for some time prevailed in the Courts. It is a personal action founded upon the fiction of the wrongful ejectment of a lessee for years, who sues the intruder, and obliges him to try the title. This action may be brought by the lessee for years of a copyhold, for a copyholder may make a lease for years either by

custom or with licence, and this lease will be a common law interest ; and thus incidentally the title to the copyhold may be tried in a common law court.

#### SECT. 77.

*And although that some such tenants have an inheritance according to the custome of the manor, yet they have but an estate, but at the will of the lord according to the course of the common law. For it is said, that if the lessor doe oust them, they have no other remedy but to sue to their lords by petition : for if they should have any other remedy they should not be said to be tenants at will of the lord according to the custome of the manor. But the lord cannot breake the custom which is reasonable in these cases.*

*But Brian, C. J. said, that his opinion hath alwaies been and ever shall be, that if such tenant by custome paying his services be ejected by the lord, he shall have his action of trespassse against him. H. 21 Edw. IV. And so was the opinion of Danby, Chief Justice, in 7 Edw. IV. For he saith, that tenant by the custome is as well inheritour to have his land according to the custome as he which hath a freehold at the common law.*

The estate of the copyholder, like that of his predecessor the villain, has been much improved since

its beginning, for he was at first apparently only a tenant at the will of the lord: but his tenure by long continuance became prescriptive, and he then held according to the custom of the manor. But between the custom of the manor and the will of the lord there was long a contest, which was not decided till the time of Littleton. Though now, as Lord Coke observes on this section, experience and a long course of legal decisions have made it clear and without question that the lord cannot at his pleasure eject the lawful copyholder: and if he do, the copyholder may have his action of trespass against him, for although he is *tenens ad voluntatem domini*, yet it is *secundum consuetudinem manerii*. (u)

#### SECT. 78.

*Tenants by the verge are in the same nature as tenants by copy of court roll. But the reason why they be called tenants by the verge is for that when they will surrender their tenements into the hands of their lord for the use of another, they shall have a little rod (by the custome) in their hand, which they shall deliver to the steward, or to the bailiffe, according to the custome of the manor, and he which shall have the land shall take up the same land in Court, and his taking shall be entered upon the roll, and the steward, or bailiff, according to*

(u) Co. Litt. 59 b.

*the custome, shall deliver to him that taketh the land the same rod, or another rod, in the name of seisin; and for this cause they are called tenants by the verge, but they have no other evidence but by copy of court roll.*

Tenants by the verge are not now distinguishable from other copyholders; nor indeed was the distinction ever more than ceremonial, the evidence of their right being the same as in other tenures of the same nature. The act of delivering the verge, which in some manors is still continued, must be considered as a custom derived to us from an age in which ceremonies were more in use, as testimonies necessary to those who, not being able to write, had no means of conveying their intention but by some outward action which many might see, and many might remember.

#### SECT. 79.

*And also in divers lordships and manors there is this custome, viz. if such a tenant which holdeth by custome will alien his lands or tenements, he may surrender his tenements to the bailiff, or to the reeve, or to two honest men of the same lordship, to the use of him which shall have the land, to have in fee simple, fee taile, or for terme of life, &c. And they shall present all this at the next Court, and then he which shall have the land by copy of court roll, shall have the same according to the intent of the surrender.*

## SECT. 80.

*And so it is to be understood, that in divers lordships and in divers manors there be many and divers customs in such cases, as to take tenements, and as to plead, and as to other things and customs to be done, and whatsoever is not against reason may well be admitted and allowed.*

By custom in this place is not to be understood that general custom or common law which extends to every copyholder in every manor, but those special and local customs which having their original in private convenience, real or fancied, have been continued by uninterrupted practice, and are become the law of particular manors, though not of the land. The law always supposes that for every custom there is or was a sufficient reason, and therefore supports the custom without any scrupulous inquiry into its original. It is observed by Littleton that any custom not contrary to reason may be tolerated; and this reason, says Lord Coke, is not the reason of every man, but that artificial reason which arises from the knowledge of the law. Upon this principle many customs are permitted, which no reasonable man would give a beginning to: but since they have been found to produce no great evil, there is no sufficient reason for changing them.



## SECT. 81.

*And these tenants, which hold according to the custome of a lordship or manor, albeit they have an estate of inheritance according to the custome of the lordship or manor, yet because they have no freehold by the course of the common law, they are called tenants by base tenure.*

What is said by Littleton in this section, implying that copyhold is a base tenure, is expressed more strongly by Fitzherbert, a very learned judge in the time of Henry the Eighth, who observes that copyhold is a new invented term used to express what was anciently called villenage, or base tenure. (x) These authorities appear to establish the opinion of those, who consider copyhold as the last improvement of villenage, by which the tenant has most of the real advantages without the reputation or dignity of freehold.

## SECT. 82.

*And there are divers diversities between tenant at will, which is in by lease of his lessor by the course of the common law, and tenant according to the custome of the manor in forme aforesaid. For tenant at will according to the custome may have*

(x) Fitzh. N. B. 12. C.

*in estate of inheritance (as is aforesaid) at the will of the lord according to the custome and usage of the manor. But if a man hath lands or tenements, which be not within such a manor or lordship where such a custome hath been used in forme aforesaid, and will let such lands or tenements to another, to have and to hold to him and to his heires, at the will of the lessor, these words (to the heires of the lessee) are void. For in this case, if the lessee dieth and his heire enter, the lessor shall have a good action of trespassse against him: but not so against the heire of tenant by the custome in any case, &c. for that the custome of the manor in some case may aid him to barre his lord in an action of trespass, &c.*

## SECT. 83.

*Also the one tenant by the custome in some places ought to repaire and uphold his house, and the other tenant at will ought not.*

## SECT. 84.

*Also the one tenant by the custome shall do fealty and the other not. And many other diversities there be betweene them.*

The purpose of these sections is only to distinguish two modes of tenancy, which, though

in their own nature distinct, might be confounded by a similitude of name. What is the estate of a tenant at will according to the custom of the manor it has been the design of this whole Chapter to explain; in which it has been shewn, that in later times such tenants hold all by custom, and nothing really by will. In a former Chapter it has also been shewn that a mere tenant at will is one who can at pleasure leave his tenement, and whom the landlord can at pleasure eject from it. They differ therefore from each other in the same manner as a permanent possession protected by the law differs from a temporary use granted by one party to another on terms which continue binding no longer than either party shall please. (*y*)

(*y*) The Editor cannot dismiss this Chapter without noticing a species of customary estate, which has attracted much attention of late years. It is that species of estate which is sometimes called customary freehold. It is stated in those cases in which their nature is discussed, that there are certain manors, chiefly in the north of England, in which there are customary tenements demiseable by copy of court roll, none of the admittances to which state the tenants to hold at the will of

the lord. In these cases the estates have the reputation of copyhold; they pass by surrender and admittance; they cannot be leased without a previous licence; and in devising them they must be surrendered to the uses of the will. Being so circumstanced, the Courts have determined that the freehold is in the lord, and not in the tenant; and, according to the opinion of Mr. Justice Blackstone, such estates are nothing more than a sort of privileged copyhold. (1)

(1) *Doe d. Cook v. Danvers*, 7 East. 299. *Roe d. Conolly v. Vernon*, 5 East. 51. Blackst. Cons. on Copyholds.

## CHAPTER VI.

## OF TENURES.

HAVING hitherto followed Littleton in considering the nature of real property, and endeavoured to explain what he has left obscure and to supply what he has omitted, we shall find it necessary to consider, in a more summary manner, the remaining parts of his volume, since many of his chapters are now not otherwise than historically useful; the greater part of the feudal settlement having first grown obsolete by a change of manners, and having been finally abrogated by a positive statute. (*a*)

The consideration of estates or degrees of property is naturally followed by that of the conditions upon which lands are held and possessed. It is necessary to observe, that between the conditions implied in the tenure of estates, and estates upon condition strictly so called, there is a distinction

(*a*) Stat. 12 Ch. II. c. 24.

more easily observed in practice than expressed in words. By conditions of the first sort are to be understood those terms which the law connects with each particular tenure. As our land is all feudal, and every subject holds his possessions of a superior lord, it necessarily follows that all lands must be held by some conditions, for there is no other imaginable way by which one man can hold of another. But as in the disposal and distribution of property there must be some rule observed, the various possible forms of granting lands were reduced by degrees to a certain number, known by distinct denominations, and described by different conditions. But those estates which the law terms strictly *estates upon condition* are held upon terms not prescribed by the law, but formed by a positive and private compact between the grantor and the possessor, either expressed in the grant or necessarily following from the nature of the compact. Thus a man may have an estate for life, on condition that he shall reside at the manor house, or keep a road or bridge in repair.

First then we are to consider the several species of tenure, and the different conditions upon which different lands are holden: but before we enumerate them we may premise that there is one condition which affects all lands, however holden. That condition is the duty of allegiance which is due to the king not only as the supreme governor of the state, but as the feudal lord of all lands.

Allegiance is defined by Lord Coke (b) to be “ the true and faithfull obedience of a subject due to his sovereign.” This definition is undoubtedly right in the sense in which it was introduced : but that sense perhaps might be better expressed by saying that “ allegiance is the system of duties arising from the relation of a subject to his sovereign.” Obedience, seeming to presuppose some command, is of too narrow a signification to comprise that active and vigilant fidelity, with which every man is bound to prosecute and defend his sovereign’s rights, *vocatus et non vocatus*, whether he has or has not a direct summons.

In the old Gothic monarchs many characters concurred which impressed obedience and respect upon the minds of their subjects. They were not only the highest civil magistrates and supreme military commanders, but they were the ultimate proprietors of all feudal land, so that almost all considerable property was held either immediately or remotely by the bounty of the king. This added personal gratitude to civil duty, and the connection of lord and vassal produced a closer tie to fidelity than the mere relation between a governor and subject. To this was added, wherever Christianity was received, a solemn consecration of their persons by ecclesiastical authority.

In the common law of England, which in far

(b) 7 Rep. 4.

the greatest part of it still retains the spirit of the feudal system, there may in like manner be observed the highest veneration for the regal authority. As the king is supposed to be the ultimate owner of all lands, his power over his subjects is conceived to be something more than political; and although the superstition of barbarous times prevails no longer, yet the law has very diligently supplied, by positive enactments, the deficiency of blind and irrational veneration. By the king in this sense is meant that person, whoever he be, who is for the present time in actual possession of the crown, however that possession has been obtained, or by whatever title it is enjoyed. (c) The king being thus considered in the light of a benefactor as well as governor, allegiance is always termed natural; and as every one born in the king's dominions has from his birth a right to protection, he is supposed from his birth to incur the duty of allegiance.

What that system of duty is which the term allegiance comprises it must not be expected that I should shew by any single definition; for allegiance being that which the laws require, is that which all the laws either directly or relatively concur to teach. As the most enormous violations of allegiance are open rebellion or secret conspiracy against the power and person of the king, it follows

(c) Stat. 11 Hen. VII. c. 1. 3 1 Hal. Hist. Pl. Cor. 61. Foster's Crown Law, 397.  
Inst. 7. 1 Hawk. Pl. Cor. 35.

that the primary and leading duty of allegiance is fidelity of adherence and readiness of defence: and with respect to this chiefly the original oath of allegiance was framed, which is thus literally translated from Britton, who wrote in the reign of Edward the First. “Hear you this, A. B. (bailiff) that I (C. D.) will from this day forward be faithful and loyal to our Lord Edward king of England and his heirs, and faith and loyalty to them will bear of life and limb and terrene honour, and nothing to their hurt or damage will know or hear, which I will not hinder to my power. So help me God and the Saints.” (*d*) The bailiff to whom this oath was addressed was the presiding officer of the court leet or hundred court, where every subject of the age of twelve was then and might still be obliged to appear to take an oath of this nature, and give sureties for his allegiance. (*e*) To bear to the king faith and loyalty of life and limb and terrene honour is, according to the explanation of Lord Coke, (*f*) to be ready to venture life and limb in his service, and to reverence him with all honour which man may receive from man. Almost the same form of words was used by a feudal tenant, when at his admission he paid homage to his superior lord, except that there was added at the close a reservation of the faith due to his Sovereign Lord the King. Liege homage or allegiance, which is the highest degree

(*d*) Britt. c. 29.(*f*) Co. Litt. 65.(*e*) 1 Hale Hist. Pl. Crown, 64.



of civil obligation, was expressed in general terms without exception: but feudal homage professed only such obedience to the immediate lord as was consistent with the higher duty to the sovereign. Thus it was provided that no gratitude or obligations to intermediate lords should obstruct or intercept that allegiance, which the king claimed equally from all his subjects.

Between liege homage and feudal homage our ancestors were very careful to preserve the distinction. The same man might be the feudal tenant of many: (g) but he could be the liege man only of one. (h) It will easily be conceived, that this multiplicity of dependencies might sometimes produce contrariety of duty; and that obedience might become very difficult to the vassal, when two of his lords quarrelled with each other. In this case the rule laid down by the feudists and our ancient common lawyers is, that he must devote his personal service to him whose liege man he is, and discharge by deputation the services which his tenure obliges him to perform to the other. “*Si inter dominos suos capitales oriantur inimicitie in propria personâ stabit cum eo cui fecit ligantiam, et per attornatum cum aliis vel salvo eis forinseco servitio in quo eis tenetur de tenemento quod de eis tenet.*” (i) When our kings had dominions on the continent

(g) Litt. s. 88.

s. 16.

(h) Craig. Jus. Feud. l. 2. t. 18.

(i) Bract. l. 2. c. 35. fo. 79. b.

of France, it sometimes happened that the same man was possessed of lands under different sovereigns. But Hale (*k*) infers from Bracton, (*l*) that liege homage was paid to one lord, and feudal homage to the other. He confesses however that this division of the same man into personal and deputed service did not always satisfy the sovereign, and that either monarch thought himself entitled to seize the lands of him who was in arms against him; nor were those lands restored at the peace without particular capitulation.

As the oath of allegiance was thought very strongly to enforce the subjects' obligation to fidelity, and at some times made to some subjects their sole obligation, it was probably administered with great diligence in the early reigns: but it is natural to formalities to vanish by degrees. The custom of administering this oath in the courts leet fell into neglect, and it was probably seldom taken but by those whose stations particularly required it. The old form however continued according to Hale (*m*) to the time of Charles the Second. But in the first year of William and Mary, a new form was appointed by the convention parliament, who do not seem to have known that they abrogated any oath more ancient than the reign of Elizabeth. The present oath is this: "I, A. B., do sincerely promise

(*k*) Hale Pl. Cor. 1. 68.

(*m*) Hale Pl. Cor. 1. 69.

(*l*) Bract. l. 5. c. 24.

and swear that I will be faithful and bear true allegiance to his Majesty King George." (n) As this oath was exacted by an assembly busy in re-establishing an unsettled government, and therefore desirous to avoid all obstacles of scrupulosity, and by men who in political opinions differed very widely from each other, and agreed only in excluding the absent monarch, it is conceived in very general terms, which the law is left to interpret.

The violation of this duty of allegiance amounts to the crime of high treason ; and in conformity to feudal notions as well as the first principles of civil government it is considered an offence of the last magnitude, and therefore visited with more severe penalties than any other.—High treason, termed by the ancient lawyers *crimen læsæ majestatis* and since *crimen proditionis*, has always been considered in legislation as the greatest violation of the laws of society, as it threatens the subversion or disorder of that government to which all individuals owe their peace and safety. In a general and civil sense it may be committed under any form of government : but in all nations where monarchical government prevails treason is an appellation given to those crimes which immediately affect the person or rights of the prince ; and in its highest degree is the act of attempting, compassing, or imagining the death of the king. According to the feudal in-

(n) See stat. 1 W. & M. c. 8.

stitution it may be termed the violation of the paramount duty of every feudal subject to his liege sovereign, or of the paramount condition upon which all lands are holden. The penalty attached to this crime is of the severest nature ; for it not only extends to the life of the traitor and the corruption of his blood, so as to render his children incapable of inheriting property through him as a connecting link in the chain of descent, but all his property both moveable and immoveable is forfeited to the king. By treason a right is violated which is prior to that of the lord ; and accordingly in the oath of fealty to the lord, and in the old form of doing homage to him, the incurrance of forfeiture for treason is strongly implied.

Having thus explained the nature of allegiance which is a condition attached to all lands however holden, we now proceed to enumerate the several species of tenures which have obtained amongst us, and their characteristic distinctions.

There are twelve species of tenures enumerated by our ancient lawyers.

1. Tenure by knight-service.
2. Tenure by escuage.
3. Grand serjeanty.

4. Common socage.
5. Petit serjeanty.
6. Burgage tenure.
7. Gavelkind.
8. Ancient demesne.
9. Copyhold.
10. Villenage.
11. Frank almoigne.
12. Tenure by divine service.

Some of these have been abolished ; yet each may deserve a short explanation, because, without some knowledge of our ancient tenures, the nature of those that remain, and indeed the greatest part of the law respecting real property, must be obscure, and almost unintelligible.

1. Tenure by knight service, of which in histories and ancient books there is more frequent mention than of any other, is generally defined to be the holding of an inheritance by some corporal service for the defence of the realm. (g) And as the defence of the realm was of absolute necessity, wher-

ever a grant of freehold was made in ancient times, without any such reservation as shewed that tenure in socage was intended, it was always understood to be held by knight's service. (*h*)

Of knight's service, in its strict and original sense, the most ancient lawyers speak with hesitation. The old book of tenures only says, that a tenant by knight's service is bound to carry arms for the defence of the realm. (*i*) Littleton is more particular; but seems not very confident of his own account. His words are these: "It is said that when the king maketh a voyage royal into Scotland to subdue the Scots, he that holdeth by a fee of knight's service must be with the king forty days in warlike array; he that holdeth half a knight's fee must attend the king twenty days; and he that holds a quarter ten. And so (says he) after that quantity, he that has more to do more, and he that has less to do less." (*k*)

If this account be true, it is apparent that by this tenure the public service was very ill maintained; for it seems that no provision was made by it but for wars within the four seas, since an attendance of ten or twenty or forty days in a foreign country would be of little use; and accordingly in the *Old Tenures*, tit. escuage, it is expressly declared that

(*h*) Co. Litt. 85. 86. 9 Rep.  
123. a.

(*i*) Section. Service de chevalier.  
(*k*) Litt. sect. 95.

knight's service operates only in wars against the Scotch and Welch. It is indeed the opinion of Lord Coke that knight's service might oblige to attendance in any other country, if such country be mentioned in the grant : but it may still be objected that if attendance could be compelled but for forty days, its use was less as the distance was greater. This account likewise supposes that a war might always be terminated in forty days ; or that after that time the soldiers might go home, and leave their king to fight his own battles.

There is another reason for suspecting, that this account is not a true description of the original state of knight's service. Littleton confesses that the time was unknown from which the forty days were to be reckoned ; whether from the day in which the army was mustered, or that on which the king entered the enemy's country. (*l*) Knight's service however was well enough known by some of its appendages : for it had adherent to it wardship, marriage, relief, aid, and escheat.

Wardship was the right claimed by the lord, when his tenant left at his death an heir under age, of taking both the land and the heir into his own hands. The heir male was in ward till the age of twenty-one years ; the heir female till sixteen.

Marriage, in Latin *maritagium*, was the power of matching the heir, whether male or female, of a deceased tenant ; and as a perquisite of feudal tenure it must be understood to mean the profit arising to the lord from the marriage of his tenant, or in plain terms the price at which he sold his ward, whether male or female.

Wardship and marriage are said to be peculiar to the feuds of Normandy, and to have been unknown in any other country governed by the feudal law. (*m*) Yet wardship seems to proceed with some appearance of equity from a military tenure : for the land is a kind of pledge for a necessary service, which when the tenant cannot perform it must be performed by a stipendiary, whom the land must maintain. The lord, therefore, who was not to lose his own rights in favour of a tenant, seized the land during a minority to make a provision for the service due. Marriage would naturally arise from the influence of wardship ; the minor being wholly in the power of the guardian, would either by fear or gratitude acquiesce in his choice, and power thus frequently exerted was interpreted by degrees into a presumptive right.

Of the claim to marriage, as of many other claims, the origin is obscure. In Normandy a female ward was not to be married but with the consent of the

(*m*) Spelman, on Feuds, 46.



lord: (*n*) but his power was only negative. And by the charter of our Henry the First a daughter of the king's tenant was not to be married without the king's consent: but from this consent he derived no profit, nor did his negative voice operate further than to restrain her father from marrying her to his enemy; and after her father's death he declares expressly that he will marry her with the advice of his barons. (*o*) But in the marriage of male heirs the Norman lords claimed no authority, nor does the feudal constitution supply any reason for which the lord's consent should be deemed necessary. It is therefore supposed by Sir Martin Wright, in his treatise on Tenures, (*p*) that the clause in Magna Charta, c. 6. requiring that *hæredes maritentur absque disparagacione* was intended to include only female heirs; but was extended to both sexes by an usurpation of the lords, which was established afterwards by the statute of Merton, c. 6. and 7. This power was exercised by the lords without restraint, except that if the heir was disparaged, that is, married to one of base condition or loathsome deformity, the next relation, to whom the inheritance could not descend, might seize the land and eject the lord. (*q*) But from disparagement they were ill secured; for from the age of discretion, that is, after the fourteenth year of the male and the twelfth of the female, being sup-

(*n*) Grand Customier, c. 33.

(*p*) P. 97.

(*o*) L. Hen. I. c. 1.

(*q*) Litt. s. 108.

posed to marry by their own judgment, they were no longer at liberty to complain of the choice. (r) If the heir on being offered by his lord a suitable match refused his compliance, he forfeited by that refusal the value of his marriage ; or so much as the lord upon a trial by jury should be adjudged likely to have gained, or could prove that any other had offered, for the match. On this condition he might remain single : but if he not only rejected the offer of his lord, but chose a wife for himself without his lord's concurrence, he was to forfeit twice the value of the marriage, (s) and after he attained his full age his lord might detain his lands till forfeiture was satisfied. (t)

(r) Stat. Mert. c. 6. Litt. s. 107.

(s) Litt. s. 110.

(t) Guardianship in chivalry, observes Mr. Hargrave, (1) could only be where the estate vested in the infant by descent. All males under twenty-one were liable to it: but not females, unless they were under the age of fourteen. It extended not only to the person of the infant, but also to all such of the infant's lands or tenements as were within the guardian's seignory ; and if the king was guardian in respect of a tenure *in capite*, then to the whole of the infant's estate of whomsoever holden, whatever the tenure, and whether

lying in tenure or not. If the infant heir held lands by knight-service of several lords, each lord had the wardship of the land within his seignory ; and as to the body the wardship of it belonged to that lord of whom the tenure was most ancient, he being styled the lord by priority, and the other lords by posteriority. But this must be understood with an exception of the king : for if any lands of the infant were holden of the king by knight's service *in capite*, he was entitled to the wardship both of the infant's body and all his lands held of the king *in capite*, or of others by knight's service. It continued

(1) Co. Litt. 88 b. n. 11.

Relief, called in the Latin of the feudists *relevium* or *relevamen*, was a fine paid to the lord when upon the death of a tenant his heir entered on the inhe-

over males till twenty-one, and over females till sixteen, or marriage. When it determined if the tenure was of a subject, the heir might enter upon the land immediately: but if the king had the wardship then, the heir was not entitled to take possession of the land without suing to the crown for livery, which was a process both nice and expensive. (2) Wardship entitled the lord to make a sale of the marriage subject only to the restriction of not disparaging; and if the infant refused the marriage tendered by the lord, or married after such tender, and against the lord's consent, in the former case the infant was liable to the payment of a sum equal to the value of the marriage, that is, to the profit which the lord might have made by the sale of it; in the latter case the heir female paid the same sum as for a refusal: but the heir male was charged with double the value, which was called a forfeiture of marriage. The guardian in chivalry was not accountable for the profits made of the infant's lands during the wardship, but received them for his own pri-

vate emolument, subject only to the bare maintenance of the infant. At least it doth not appear from any work that we have seen, what means were provided for forcing the guardian out of the profits of the estate in wardship to support and educate the infant in a style and manner suitable to his rank and fortune. Lastly, guardianship in chivalry being deemed more an interest for the profit of the guardian than a trust for the benefit of the ward was saleable and transferable, like the ordinary subjects of property to the best bidder, and if not disposed of was transmissible to the lord's personal representatives. Thus the custody of the infant's person as well as the care of his estate might be devolved upon the most perfect stranger to the infant; one prompted by every pecuniary motive to abuse the delicate and important trust of education, without any ties of blood or regard to counteract the temptations of interest, or any sufficient authority to restrain him from yielding to their influence. This explication of the nature of wardship in chi-

(2) Co. Litt. 77. a.

ritance. The reason of the appellation is thus given by Bracton: *Quia hæreditas, quæ jacens fuit per antecessorum decessum relevatur in*

valry, general as it is, may well excite a strong idea of the horrid evils necessarily incident to it. On the first reflection it is natural to wonder how it happened that a species of guardianship so constituted on principles repugnant to the voice of nature, so founded in inhumanity, so retarding to the progress of science and literature amongst persons of high birth and with great hereditary estates, and so seemingly replete with mischiefs both public and private, should in a country distinguished for continual struggles to preserve the valuable and to annihilate the oppressive parts of its constitution, be patiently endured for several centuries after the Conquest; and even remain unreformed by any effectual checks to soften its rigour, till it was wholly taken away at the Restoration. Perhaps, however on further consideration of the subject, the wonder may in some measure cease; for the facility of evading guardianship in chivalry, which could only be on a descent, may account both for its being so long submitted to, and for its producing consequences less extensively pernicious than seem almost necessarily incident to it. Various modes of preventing the descent were practised. One was enfeoffing the heir in the ancestor's lifetime, and another was enfeoffing strangers on condition to pay a sum far exceeding the value of the land, at a time so fixed as to correspond with the heirs coming of age, who might then enter for breach of the condition.(3) When these modes were declared to be fraudulent, and therefore checked by the statute of Marlebridge, a third still more fit to attain the same end succeeded; for uses and trusts being invented, and guardianship in chivalry being only of legal estates, it became the fashion to make feoffments to uses, as well for preventing wardship as for avoiding reliefs and forfeitures, and indirectly exercising the power of devising; and thus the heir taking only the use of the land on a descent, instead of becoming the legal tenant, he of course escaped being in wardship. This evasion continued in practice till 4 Hen. VII. when the legislature thought proper once more to interfere in

(3) See stat. Marlebridge, 52 Hen. III. c. 6, and 2 Inst. 109.

*manus hæredum, et propter talem relevationem facienda erit ab hæredibus quædam præstatio quæ dicitur relevium.* (v) Reliefs were in all feudal nations part of the burthens imposed upon the tenants of which an easy explanation will be found by reflecting that feuds were at first granted during pleasure, and afterwards only for life. It will easily be conceived, that when it became customary to prefer the heir of the deceased tenant, this preference would not always be gratuitous: the avaricious would exact some profit from the land when it fell back into their possession, and the most liberal would require some acknowledgment that the admission of the heir was rather an act of favour than a declaration of right; and for one or other reason it would soon become customary for every succeeding tenant to pay a fine or offer a present. "These "reliefs," says Sir H. Spelman, "were in other

favour of the lord, and made the heir of *certainque use* equally liable to wardship in chivalry with the heir of one dying seised of the legal estate.(4) Indeed for some time after 4 Hen. VII. there seem to have been no other means of preventing wardship in chivalry than the ancestors making a lease for life with remainder to his heir apparent in fee. But this protection of wardship in chivalry was soon followed by a great diminution of its profits:

for in the succeeding reign the statute of wills gave the power of devising, so as to deprive the lord of the wardship in two thirds of the land holden by knights' service; in which contracted state this odious species of guardianship was suffered to languish, till it was entirely abolished by the famous statute of Charles the Second, together with the other oppressive appendages of military tenure.

(v) Bract. fo. 84.

(4) 4 Hen. VII. c. 17. Co. Litt. 84. b. and 2 Inst. 119.

“ nations so various and uncertain that the lords  
“ exacted what they listed, when the feud fell into  
“ their hands upon the death of the feudal tenant,  
“ constraining the heir as it were to make a new  
“ purchase of the feud.” (u). In England, as it is  
supposed by Lord Coke, reliefs were fixed at a  
certain rate : but it is the opinion of Sir M. Wright  
that here, as in other places, they were at first arbitrary and unsettled ; and that the conqueror, who  
is said by historians to have disinherited many of  
his nobles without the judgment of their peers,  
committed this injustice by demanding enormous  
and impossible reliefs ; and he remarks that the ex-  
action of unreasonable reliefs is the first temporal  
grievance redressed in the several charters of Henry  
I. king John, and Henry III. The reliefs in earlier  
times, as appears by the laws of Henry I., were  
paid in horses, and arms, and habiliments of war :  
but these, like other things, were in time resolved  
into money ; and in Magna Charta, c. 2. it is settled  
that the relief of an earldom shall be 100 pounds,  
of a barony 100 marks, and of a knight’s fee 100  
shillings, and in proportion for inheritances of less  
value. The sum of a hundred shillings or five  
pounds is one quarter of the supposed annual value  
of the land comprehended under the denomination  
of a knight’s fee, which, as appears by the statute  
*de militibus* I. Edward II. was anciently settled at  
twenty pounds a year : and an estate which, ac-

(u) Spelm. Treat. on Feuds 33.

according to this original valuation was accounted a knight's fee, continued to be so esteemed, notwithstanding any improvement of particular lands, or any general alteration in the value of money.

Aids or *auxilia* were originally voluntary presents made to the lord by his tenants at any time of exigence or necessity. But as there were certain times at which those exigencies recurred, there were certain times at which a present was expected. The expectations of power were not to be disappointed, and what was at first the gift of gratitude became in a little time the tribute of subjection. *Auxilia*, says Bracton, *fiunt de gratiâ, et non de jure et pro necessitate et indigentia domini capitalis*: (x) but it is observed by Spelman in his Glossary (*voc. auxilium*) that *quod ex gratiâ primum largiabatur jure postea exigitur, et pro voluntate domini*. Of aid both the custom and the name is derived from the Normans; whose vassals, as appears from the Customier, (y) were obliged to aid their lord, when he made his eldest son a knight; when he married his eldest daughter; and when being taken prisoner by his enemy he wanted a ransom. There was likewise paid to the inferior lords of that country an aid of relief that they might be enabled at entering upon their inheritance to pay relief to their superior lord. These Norman claims were extended much further by the English

(x) Bract. lib. 2, c. 16, s. 8.

(y) Gr. Cust. c. 35.

lords, who took aids of their tenants not only to discharge their fines to the king but to pay their other debts. (æ) By king John's great Charter all aids were abolished except the three first mentioned Norman aids to make the lord's eldest son a knight, to portion his eldest daughter, and to redeem his person : and it is declared that the king himself shall not have aid in any other case except by authority of the great council of the nation. But these restrictions were omitted in the charter of Henry III., and the old aids again revived, till by the stat. 25 Edward I. c. 5. & 6. the king declared all aids abolished except the ancient and accustomed aids and payments. These aids are conceived by Lord Coke to be only aids *pur fille marier* and *pur fair fitz chivalier*. The nature of the aids was now settled : but their quantity or value remained uncertain till the stat. Westm. I. c. 36. rated the aid for a knight's fee at twenty shillings, and for socage lands of 20*l.* a year at the same sum. The king's tenants however still remained at his mercy, till by stat. 25 Edw. III. c. 11. the king's tenants were rated like the rest. Whether the aid *ad corpus redimendum* was reserved by the stat. 25 Edw. I. lawyers have disputed. As the words were only declaratory of a more ancient practice, we can only judge of their sense by rational deduction ; and it will appear very unlikely that an aid more just and necessary than any other,

(æ) See Mad. Hist. of the Exchequer, 428.



and equally founded in the Norman constitution, should be intentionally abolished. That it should be little mentioned is not strange, because with respect to our kings it was never wanted: but there is still extant a writ issued by Edward II. to the tenants of John duke of Bretagne as earl (Palatine) of Richmond soliciting their contributions to ransom their lord, then a prisoner in Scotland. The terms used are rather those of entreaty than of demand; for which a very natural reason may be given, that ransom not being previously determinable had never been settled at a certain rate, and therefore much was left to fidelity and benevolence. (*b*)

As it is in the nature of feuds to continue always in some degree subject to the rights of the original grantor, it naturally returns to him when it has no immediate possessor; which may be by defect of lineage, or by the commission of felony. This return of the fee to the lord is called an escheat.

By the feudal institutions, if the offence of felony were committed against the lord, it was to the lord that the forfeiture was made, whatever was the nature of the feud. (*c*) And the offences against the lord were so numerous as to include almost every considerable injury to his person, his feudal dominion, his own honour, or that of his family. (*d*)

(*b*) See Mad. Hist. of the Exch.  
428.

(*c*) Feud. lib. 2. tit. 26.

(*d*) Corvini. Jus. Feud. lib. 2.  
3 & 4. and Craig. Jus. Feud.  
lib. 3. tit. 3.

No word in the criminal law of this country is of more frequent use than felony; yet its etymology, and consequently its original meaning, is very uncertain. Lord Coke, with his usual infelicity of derivation, says after Rastal, that felony is *crimen felleo animo perpetratum*, a crime committed with a mind replete with gall, that is, with malignity. (m) Felony, according to Cowell, is *omne crimen capitale infra læsam majestatem*; an account practically useful, but not satisfactory. (n) As it is a term relative to the feudal constitution, it has probably its origin from some of the northern languages, and is accordingly derived by Spelman and Du Cange in their Glossaries (voc. *felo*) from the Saxon *fælen*, to offend or to fall, or from the Saxon *feah*, fee or feud, and *lon*, which in German is price. These derivations, whether right or not, agree very well with the definition given by the feudists of felony. “*Felonia est culpa seu injuria propter quam vassallus amittet feudum*,” says Hostiensis, tit. De Feudis; and by the laws of Henry the First, c. 43. *Qui feloniam fecerit terram suam forisfecit*. (o) So that the essence of felony seems to have been anciently the loss of possession; and Spelman even gives the name of felony (perhaps somewhat improperly) to the taking of holy orders, and other acts not in themselves criminal, by which in the

(m) Rastal's *Termes de la ley*,  
340. Co. Litt. 391.

at the end of his *Instit. Juris*.  
*Angliæ*.

(n) See Cow. Ind. Dict. Obscur.

(o) Lamb. Arch. 190.

feudal law a forfeiture to the lord was incurred. (*p*) With us this term has always implied an offence against the laws of society. Strictly taken it denotes an offence so heinous, as to render the offender unworthy to hold or transmit feudal property, and it therefore reverts to the lord of whom it was before held; and in common acceptation it impresses rather the idea of the crime than of the punishment.

If a feudatory committed a crime which deserved deprivation of his fee, but which was not immediately an offence against the lord, a distinction was made between *feudum paternum*, or an estate by descent, and *feudum novum*, or a recent grant. If the feud came to him by inheritance, it went to his relations; yet not to his son or other lineal descendant, but to the next collateral relative, who succeeded, I apprehend, not as heir to the felon, he being deemed (as with us) unworthy to transmit property, but as a descendant from the first grantee. (*q*) But if it were a new feud, whatever was the offence by which it was forfeited, it passed immediately to the lord. (*r*) In England the distinction between *feuda nova* and *feuda paterna* was never much regarded, the fiction of feudal tenure having been introduced at once in all lands by one general law; and wherever an estate of

(*p*) Spelman, Gloss. voc. Felon.

(*r*) Corvini Jus Feud. lib. 3.

(*q*) Feud. lib. 2. tit. 24. & 26.

L. 10.

inheritance is totally lost by the commission of a crime, it is forfeited to the lord of whom it is held, unless the offence amount to high treason. That universal forfeiture which has been already mentioned as the consequence of high treason is peculiar to that offence: other crimes though capital, and in the eye of the law offences against the crown, make only the personal or moveable estate forfeited to the king; and the land escheats to the immediate lord, except that the king has a year and a day, and waste, that is, he has all that can be found, and all that can be got upon the estate, and a year and a day in which to get it. The opinion of Lord Coke (*s*) indeed, which he borrows from Bracton, (*t*) is that the king had originally a right only to the waste, that is, to take all he could take, and destroy all he could destroy; but that the lords to save their lands from the devastation which in those savage times was very great, for the houses were demolished and gardens utterly destroyed, allowed the king the profits for a year and a day: but that the king by the encroachment of power took both. But the statute *de prerogativâ regis*, speaking of this right in the reign of Edward the Second, expressly empowers the king to take the profits of the land for a year and a day, and afterwards to waste and destroy it, “in the houses woods, and gardens, and in all manner of things belonging to the same land *excepting men* ;” and

(*s*) 2 Inst. 37.(*t*) Bract. fo. 129.

that exception only relates to certain places privileged by the king in that respect. The statute goes on: "And after our lord the king hath had the year, day, and waste, then the land shall be restored to the chief lord of the fee, unless that he fine before with the king for the year, the day, and the waste." (u) Accordingly such is the law at this time, whatever be its original, that the king takes the moveables as forfeited by the offence of the tenant, and the lord the land as falling to him by corruption of blood: but the lord cannot upon such an escheat enter into the lands, unless he have a special grant from the crown, till it appears that the king hath had his prerogative of the year, day, and waste. (x)

Corruption of blood is an effect annexed by the law to treason and felony, by which the offender is so far put out of existence as to have neither ancestor nor heirs, to be neither capable of receiving possession nor transmitting it, neither of inheriting nor leaving inheritance. A felon therefore is in the state of a man who dies without an heir, and his land passes as in that case it would have passed. (y) The devolution of the land to the lord is therefore called an escheat, from *eschoir*, to fall or happen, which therefore means an accidental return of the possession to the general owner by a cessation of

(u) Stat. 17 Edw. II. stat. 1.  
c. 16.

(x) 2 Hawk. P. C. 448.

(y) F. N. B. 143, 144.

that right by which it was held of him. On this account the expression used by the statute *de prerogativâ regis* is, "that the land shall be restored to the chief lord of the fee:" and in this sense Glanvil seems to have understood it in the reign of Henry the Second, when he says, "*Si quis de felonîâ convictus fuerit, eo per jus regni exhæredato, terra sua domino suo remanet.*" (z)

The distinction between escheat to the lord for felony, and the total forfeiture to the king for treason, may be further illustrated by a passage in Sir Mich. Foster's Crown Law. (a) After having enumerated three statutes of Queen Elizabeth, one of King William the Third, and one of King George the Second, which create new treasons, and yet provide against any corruption of the offender's blood, he observes that "there is a remarkable difference in the wording of them. They all agree in saving the blood: but the acts of Queen Elizabeth go further, and provide that no forfeiture of lands shall be but during the life of the offender. These words are omitted in the statutes 8 & 9 Will. III. c. 25. and 15 & 16 Geo. II. c. 28. which relate to the coin;" and "therefore" he adds "with regard to the treasons created by these acts, the lands of the offender will be forfeited to the crown, though the blood of the heir remaineth uncorrupted, *i. e.* capable of inheritance. In the case of felony a

(z) Glanv. Eschæta, lib. 7. c. 17.

(a) P. 222.

bare saving the corruption of the blood preserveth the descent to the heir, because in that case the lord of the fee becometh entitled by way of meer escheat, *propter defectum sanguinis*; and consequently while the blood of the heir remaineth uncorrupted, there can be no escheat. But in the case of high treason the forfeiture, sometimes but improperly called the royal escheat, accrueth to the crown, of whomsoever the land is holden, *propter delictum tenentis*. And doubtless the offence is not purged by such saving clause, though the blood of the heir is saved." (b)

This doctrine of escheat to the lord while lands were held by feudal grant or subject to feudal services, and the relation between the lord and vassal visibly subsisted, was neither unreasonable nor difficult to be accounted for: because it implied nothing more than that a grant made on certain conditions was to cease when those conditions were broken. But since land has become the subject of commerce, and has been bought and sold through a series of possessors, the feudal lord's right must be considered as subsisting after the reason has ceased; and it would probably have been either turned into a royal forfeiture or entirely abolished, but that the property usually affected by it is too inconsiderable to merit much regard from the legislature.

(b) See 3 Inst. 47. and 1 Salk. 85.

As by the same act for which lands are forfeited to the lord the offender's life is likewise forfeited to the public, felony strictly and properly taken may now be defined, "an offence for which life is lost, and the offender's land escheats to the lord of whom it is holden, except where both are saved by benefit of clergy, (c) or particular statutes as

(c) The exemption which is denominated the benefit of clergy implies not the absence of guilt, but a supposed inviolability of person. Every deviation from right is punished by the civil magistrate, not as it is a sin or transgression of the laws of God natural or revealed, but as it is a crime against the laws of society. Yet it is unquestionably both the duty and interest of the civil magistrate to promote by every possible method virtue and religion; and therefore in almost every Christian country some coercive power is given to the clergy, whose province it is to watch over the manners of the people, and to censure vice *pro salute animæ*.

While Christian zeal continued in its first fervour, no punishment could be more dreaded than excommunication, because no man then united himself to the church with any other hopes than those of futurity. But when Christianity became the religion

of the state, the faith began to be professed for other reasons than the hope of heaven. Ambition complied with the Court, and indifference followed the mode; and the churches were filled with worshippers, who brought with them all the hopes and fears of the Gentile world. From this time censures purely spiritual began to lose their force. The first Christian emperors therefore found it necessary to connect present penalties with ecclesiastical censures, that the authority of the clergy might still operate to prevent either corruption of faith or depravation of manners. This accession of power produced a jurisdiction of a peculiar kind, partly spiritual and partly civil; and thus was naturally produced the Court Christian, of which the privileges were gradually amplified and the power extended, till it was made the great instrument of government over the Christian world.

For the predominance of the



in many felonies they are." In a larger and less proper sense, the name of felony is likewise extended to some acts for which only goods are for-

power of the clergy in the middle ages, many reasons are obvious and manifest. The clergy were chiefly employed in all cases where a cultivated understanding was required, because all learning was confined to the clerical order. The learning here intended is not to be confined to the knowledge of difficult and refined speculations, but embraced every thing that could be known from the first rudiments of letters to the most abstract parts of science; for the clergy were almost the only men in those days that could read and write. It is by no means wonderful that in such an age a number of men so distinguished from the rest of the community should combine in one common interest to erect a community of their own. To this they were incited by the natural love of privilege and security; and they were encouraged by the Pope himself, in order that he might have in every Christian kingdom the most learned and powerful part dependent on himself, and ready to maintain his claims against the civil magistrate. In the council of Lateran in the beginning of the twelfth century

under Pope Innocent the Second was made the famous canon, *si quis suadente diabolo*, which may be seen in the *Corpus Juris Canonici* (*Decretum Gratiani parte 2da., causa 17. quest. 4. can. 29.*) and which enacted that "if any one shall incur the guilt of sacrilege by laying violent hands on a clerk or monk, he shall be subject to an anathema, from which no bishop shall presume to absolve him (except in danger of speedy death) till he has been brought into the presence of the Pope, and received from him his due sentence."

In consequence of this and other canons, Archbishop Becket is well known to have endeavoured in the time of Henry II., to exempt clerks from the jurisdiction of the civil magistrate. As the king and the bishop were both resolute, the quarrel was inflamed by mutual obstinacy, till the prelate was murdered at the instigation of the king. Henry, who had hitherto stood on defensible ground, was now driven from his hold; he had done what he could not justify; and, loaded with the guilt of sacrilege and murder, was

feited to the king, as *petit larceny*, and homicide by *chance medley or se defendendo*. (d)

obliged to make satisfaction to the church, by resigning that authority which he had endeavoured to preserve at the price of blood.

In the 45th of Henry III., Archbishop Boniface, in a synod of the province of Canterbury, made a constitution, by which he denounces excommunication against those who upon a criminal accusation shall take a clerk into custody, and refuse to give him up at the requisition of his ordinary. (Lyndewood's Provinciale, p. 92. edit. Oxon.) By the same constitution he subjects to an interdict the places in which clerks are confined, and the lands of those who detain them. Another constitution of the same prelate shews that the clerical privileges were not always nicely regarded; for he decrees, that if a clerk while he is in the hands of a lay-magistrate shall be maliciously shaven to obliterate his tonsure, and so hanged or otherwise punished, he that hangs or punishes him, and all those that counsel or abet the deed, shall be subject to excommunication and interdict. (Lyndew. Prov. 321.)

In the same reign the law respecting the prosecution of clerks is very accurately laid down by Bracton, fol. 123, "When a clerk, be he of whatever order or dignity, shall be taken and imprisoned for murder, or any other crime, and the ordinary of the place requires him to be given up to the Court Christian, the clerk so imprisoned shall be immediately put into his hands without any examination, yet not so as that he shall be set at full liberty and rove at large over the country, but shall be kept in safe custody either in the bishop's prison, or in the king's, at the choice of the ordinary, till he shall have purged himself from the charge, or not purging himself he shall be liable to degradation. The reason why he must be delivered to the Court Christian is this, that the king cannot imprison him whom he cannot judge, and that the king cannot take away those clerical orders which he cannot confer."

From the account thus given by Bracton, we learn, among other things, that when the clerk was delivered to the ordinary, he was required to purge himself of

(d) See Co. Litt. 391. and Spelm. Gloss. voc. Felon.

II. Nearly connected with knight's service was tenure by escuage, which according to the book of Old Tenures was a certain sum of money levied

the crimes with which he was charged. Purgation was made by a declaration of his own innocence upon oath, corroborated by the oaths of others, declaring their conviction likewise of his innocence. These collateral vouchers were called compurgators. It was the rule *quod purgare debet se aliquis cum suis paribus*. (Lyndew. Prov. 314.) A clerk therefore was required to bring the testimony of clerks in his favour, and those clerks of the same rank or order: but as clerks were not always to be had, the rigour of this constitution was abated. *His deficientibus vel existentibus inimicis, potest se purgare cum inferioribus, etiam laicis, et etiam mulieribus*. (Lyndew. ib.) The clerk thus cleared was considered as innocent whatever testimony had appeared against him; and was restored to his former condition, both clerical and temporal. What was the fate of him who would not purge himself, or could not find compurgators, is not very clear. The ordinary, it appears, might detain him for any great crime in prison during life, or he might degrade him from his clerical character. (Bract. *ubi supra*.)

When he was degraded, I apprehend the ordinary could not detain him in prison, because by his degradation he became a mere layman, and subject to a different jurisdiction. He was therefore dismissed, as it is most likely, to wander through the world in contempt and indigence. But this degradation was considered as his punishment; and he could not be indicted again for the same offence, because *nemo bis puniri debet pro eodem delicto*.

When the clergy had exempted their persons from the jurisdiction of the temporal courts, they soon extended the privilege to their possessions; for having established the rule, that a clerk was never to appear before a lay tribunal, it necessarily followed that every cause, in which a clerk was a party, must be tried by ecclesiastical judges. By degrees some real or imaginary connection was formed between the clergy and almost every case; and it is incredible how far the ecclesiastical jurisdiction was at last extended. A catalogue of these usurpations may be read in the *Monumenta Ecclesiastica* of

by the lord upon his tenant to maintain wars against the Scotch and the Welch, in such proportions as the parliament should appoint. It is supposed with

Suarez. and in Giannone's History of Naples, B. 19. ch. 5. sect. 3.

The ecclesiastical privilege with respect to capital crimes, which is what we generally mean by benefit of clergy, was very early extended to the inferior orders, namely, those of sub-deacon, acolyth, reader, and ostiary, whose relation to the church, however slight, was undeniable and apparent, and who are described by Lyndewoode (Prov. 92.) as having *primam tonsuram*. Here it might have been expected to stop, for the pretensions to the clerical character could go no further: yet it was indulged not only to clerks, but to all who by their learning were capable of becoming clerks, and every man who could read, *ut clericus*, that is, could read a verse in the Bible, was delivered to the ordinary as a clerk.

For some time the contest between temporal and ecclesiastical power occasioned some fluctuation in the practice of the Courts. By stat. 18 Edw. III. c. 2. it was enacted, that if a clerk insisting upon his clergy, and refusing to plead before lay judges, should

be charged with *bigamy*, that is, with a second marriage, being a widower, or with having married a widow, the bigamy should be tried in the spiritual Court, and the party remain in prison till he was cleared or condemned of bigamy by the bishop's certificate. The reason of this provision was, that bigamy was so detested by the church in the middle ages that he who committed it forfeited all claim to the clerical character: and was therefore deprived of the benefit of clergy, however otherwise entitled to it. From this law it may reasonably be inferred, that if not mere laymen, at least the inferior orders of the church, were admitted to this privilege; for it is certain that bishops, priests, and deacons, were not allowed to marry; and therefore respecting them it could never be a question, whether they had married twice. Yet we find complaints made a few years after in the same reign, in the stat. 25 Edw. III. stat. 3. c. 4. that secular clerks, as well chaplains as other monks, were drawn and hanged by award of secular justices, and a new confirmation of the privileges of Holy Church, by which it was granted that all

great probability by Sir Martin Wright, (e) that by the term “escuage” was signified both an original tenure, and a compensation for the duties of knight’s

clerks, as well secular as religious, should be delivered to their ordinaries, when demanded.

From this time by some construction or other, which it is now difficult to comprehend, or upon some principle of policy which is forgotten, the benefit of clergy seems to have been extended to all who could read (2 Hawk. Pl. Cr. 338. Kelyng. Rep. 102.) For though it appears that in the next year it was held by Justice Shard, *Quod literatura non facit clericum nisi habeat sacram tonsuram*, (Lib. Ass. 26 Edw. III. pl. 19.) yet the contrary opinion evidently prevailed; and none were excluded but heretics convict, Jews, Mahometans, and Pagans, who not being Christians could not be clergymen, the whole female sex (nuns?) and by a limitation that appears still harder, all persons blind or maimed, and for those defects excluded by the Romish canons from the clerical order. (11 Rep. 29 b.)

Of crimes there were very few exceptions. The zeal with which

the feudal constitution always superintended the safety of the crown kept vindictive justice in its full force against high treason and felonies respecting the king’s person or majesty. (See stat. 25 Edw. III. stat. 3. c. 4. and 2 Inst. 634.) But all other felonies, the most aggravated species of murder not excepted, might be committed without danger of life by him whose education enabled him to read as a clerk.

Since this privilege was not only in itself unreasonable, as securing impunity to those who, if any distinction should have been made, ought to have been punished with greater severity than others as offending against greater knowledge, but excited resistance by being appropriated to a distinct order in the community, the temporal courts were constantly endeavouring to diminish it.

In the original state of the common law, the clerk was to plead his privilege when he was first arraigned; for if he consented to be tried by the tempo-

service. He that held by escuage as an original tenure, held by the payment of a sum of money not previously ascertained, but such as should be rated

ral judge, he was obliged to stand by his award, and could not revive his claim after conviction. (See Staundf. Pl. Cor. 151.) But by the stat. 25 Edw. III. stat. 3. c. 4. the privilege of clergy was allowed after conviction. The practice, however, seems to have continued as before till Prisot, C. J. in the time of Henry VI. obliged the party indicted of felony to answer to the charge; and after conviction, upon his demand, allowed him his clergy. (Kelyng. Rep. 100.) In consequence of this, if the prisoner was acquitted by the jury he was dismissed without further vexation; if he was convicted, he was delivered to the ordinary, who considering his trial at common law as having passed *coram non judice*, admitted him to canonical purgation. This change, therefore, being advantageous to the prisoner, was continued without complaint.

In the time of Henry the Seventh it was found necessary to restrain the benefit of clergy with respect to those who enjoyed it without clerical orders. It is not unlikely that, education being more diffused, there might be a

greater number of lettered criminals. It was therefore enacted, by stat. 4 Hen. VII. c. 13. that merely by ability to read, or by some inferior relation to the church, a felon not in holy orders should escape but once, nor once without such a degree of punishment as was nearly adequate to inferior felonies; for he was to be allowed the benefit of clergy once only, and if convicted of murder was to be marked with the letter M. on the brawn of the left thumb; if of any other felony, with the letter T.

This was the first statute, which in any degree restrained the benefit of clergy, and thereby opened the way for a very great and advantageous change in the distribution of criminal justice. It was followed by several others of a similar tendency, particularly the stat. 12 Henry VII. c. 7. which took away all benefit of clergy from any lay person, however literate, who should commit petty treason, by the murder of his lord or master; and by stat. 4 Hen. VIII. c. 2. which enacted that persons committing murder, or certain other felonies, should not be admitted to the benefit of

by parliament as a compensation for knight's service. But the difference between this kind of escuage and knight's service, properly so called,

clergy, "such as ~~be~~ within holy orders only except." This exception was held to extend only to bishops, priests, deacons, and sub-deacons; but not to any inferior order of ecclesiastics. The law, therefore, gave very great offence to the clergy, amongst whom the maxim obtained, that *tam minores quam majores ordines sunt sacri*. (Keilw. Rep. 180.)

The fence was now broken down, and from this time statutes were made, some of which took away the benefit of clergy in certain cases, even from clerks in holy orders, (stat. 28 Hen. VIII. c. 1.) and others, as stat. 34 and 35 Hen. VIII. c. 14. regulated and restrained canonical purgation; till at length that kind of trial was entirely abolished by the stat. 18 Eliz. c. 7. which enacted, that for the future a felon entitled to the benefit of clergy should not be delivered to the ordinary, but should, after such burning in the hand as was required by the before-mentioned stat. 4 Hen. VII., be set at liberty, provided, however, that the judge by whom he was tried should have power for the further conviction of such

felon, to detain him in prison for any time not exceeding a year.

By this time the benefit of clergy, both with respect to clerks in holy orders and others, was entirely taken away from the most atrocious felonies, and from this time the principal difference between an ecclesiastic and a layman who could read, was that the lay clerk could have the privilege only *once*, the clergyman, where the nature of his offences would allow it, might, as he still may, claim the benefit without limitation.

Women however were still utterly incapable of being admitted to the benefit of clergy; and therefore frequently suffered death on account of crimes, for which a man, or at least a man who could read the *neck verse*, as it was popularly called, would have received a punishment comparatively inconsiderable. This mischief was not entirely removed till a statute was passed in the third year of William and Mary, c. 9. which enacted, that in every case where a man might pray the benefit of clergy, a woman should

was, that he who held by knight's service, properly so called, was originally required to serve in person, and paid escuage as a commutation or penalty for his omission. He satisfied by that payment the original condition of his tenure, yet was considered as holding by knight's service in effect, because the payments were made for military uses. This last species of escuage, which seems to have been more frequently mentioned by our lawyers, doubtless began early, though its origin is uncertain. It is generally supposed to have commenced in the time of Henry the Second: but an obscure passage in the Saxon Chronicle affords some reason for refer-

be entitled to the benefit of that statute, and should like a man to whom clergy is allowed be burnt in the hand by the gaoler in open Court, and be kept in prison for such time not exceeding a year as the judge should think fit.

To render the law with respect to benefit of clergy equal and just, nothing now remained but to take away the trial by reading, from the necessity of which, as well as from the disgrace of burning, peers of the realm had already been exempted by stat. 1 Edw. VI. c. 12. It was therefore at length enacted by stat. 5 Ann. c. 6. that from thenceforth if any one should be convicted of a felony, for which if the act had not

been made he ought to have had benefit of clergy, and the felon so convicted should pray to have the benefit of this act, he should not be required to read, but should without any reading be considered as a clerk convict, and punished accordingly, which should be as effectual to all intents and purposes, and as advantageous to him, as if he had read as a clerk.

Thus by the wisdom of the legislature, and by successive experiments, good has in the end been extracted out of evil; and that which was at first an unreasonable and impolitic exemption is now become a general and equitable mitigation of punishment.



ring the first rise of such commutations to the time of William Rufus. "The king," says the Chronicle, "ordered a levy to be made in England of twenty thousand men, who were to be sent to him into Normandy : but when they came to the sea-side, he ordered them all to go back again, first paying to his agents the money which they had received, amounting to half a pound a man." (*f*)

Escuage as in the case of other payments, while it continued arbitrary, was sometimes thought unreasonable and oppressive ; it was therefore provided in the charter of King John that escuage should not be levied but by parliament. (*g*) This provision was omitted in the charter of Henry the Third now in force : but is nevertheless supposed to have been observed as a practice prudent and politic at least, if not required by law. The parliament soon reduced it so low, as probably not to be worth the charge of collection, and therefore it was not levied after the eighth year of Edward the Second. (*h*)

Escuage as it had the honour had likewise the burthens of knight service, so that tenure by escuage and tenure by knight's service are frequently confounded or used as synonymous. But knight's service and escuage, considered as military services,

(*f*) Sax. Chron. p. 201.

Charter, 4to. p. 13.

(*g*) King John's Magn. Ch. s.

(*h*) Co. Litt. 72 b.

12. Blackst. Ed. of the Great

were reduced almost to names and shadows before they were formally abrogated by the stat. 12 Ch. II. c. 24. (*i*)

3. Grand serjeanty is a tenure by which some service is to be performed to the person of the king, and is therefore termed "grand" from him to whom it refers. This service was commonly military, such as the office of carrying the king's banner or lance. But land likewise held by the office of Marshal, high Constable, high Steward or great Chamberlain of England, or by any office belonging to the receipt of the king's treasure, or the administration of justice, or by any service done to the king's person at his coronation as that of bearing his sword or cap, was held likewise in grand serjeanty. (*k*) Knight's service was included in grand serjeanty. But grand serjeanty exempted the tenant from paying aids for making the lord's son a knight, or marrying the daughter to which he would have been bound by knight's service. By the stat. 12 Ch. II. c. 24. tenure by grand serjeanty was changed into common socage: but the honorary services were still retained. Thus the king's champion still pronounces his challenge on the day of the coronation, but holds that land in socage which he held before by grand serjeanty.

4. Common socage is "that tenure in which some

(*i*) See Selden's Table Talk collected by Milward, p. 29.

(*k*) Co. Litt. 105. See also Litt. s. 154.

certain payment is made to the lord ;” or perhaps it may be negatively defined to be “ any free tenure not military,” for a tenant in socage may be made only by doing fealty to the lord. (*l*) Certainty of payment will make a tenure in socage ; and therefore if a tenant by knight's service agreed to pay his lord a certain sum for escuage whenever it might be levied, his tenure from that time became a tenure in socage. This tenure is equally constituted by any certain reservation small or great ; not only a pecuniary rent, but a pair of spurs or a rope to be delivered at a stated time, make a tenure in socage. (*m*)

Tenants in socage were exempt from wardship and marriage ; but were liable to the two aids for knighting the son and marrying the daughter. The aids were settled as in knight's service at twenty shillings for 20*l.* a year, and for a relief was paid twice the quit rent or socage rent paid in any other year : so that if no quit rent was reserved when the tenure was created, no relief was due. These aids were abolished by the before mentioned stat. 12 Ch. II., and nothing is now paid but rent and relief : but land in socage may escheat in the same manner and for the same causes as lands held by knight's service formerly did.

5. To socage may be referred tenure by petit serjeanty, that is, by an obligation to pay a bow or

(*l*) Litt. ss. 117, 118.

(*m*) Co. Litt. 64. a.

arrow, or any other implement of war, to the king. Like grand serjeanty, it was exempt from aid and by that was distinguished from common socage. But being a species of socage, it is not abolished by the stat. 12 Ch. II.

6. Another species of socage is burgage tenure ; which is an inheritance in an ancient borough held of the lord by a yearly rent. (n) This likewise being a species of socage has not been abolished, but still subsists in many ancient boroughs ; and is at present chiefly remarkable for the privilege that burgage tenants have by virtue of such tenements of voting for representatives in Parliament.

Tenements by knight's service escuage or socage might be held of the king, or of an inferior lord. He that held of the king was called a tenant *in capite*. Grand and petit serjeanty were tenures *in capite* by their own nature. A tenant *in capite* besides the wardship, marriage, aids, and reliefs to which according to the nature of his tenure he was subject, like other tenants, was likewise subject to fines for alienation, and primer seisin.

Those who held of the king *in capite* were not included in the statute *quia emptores*, being not named in it. They were therefore restrained from unqualified alienation ; and if they dismembered

(n) Litt. ss. 162, 163.

their estates, so as not to leave sufficient for the services due to the king, the king might distrain upon the part separated for the service of the whole, (o) and it seems to have been understood that the land itself was forfeited. But the rigour of the king's right was relaxed by the stat. 1 Edw. III. c. 12. which allowed alienation to be compensated by a reasonable fine.

Primer seisin, was a right claimed by the king upon the death of every tenant *in capite* to re-enter the land, and retain it in his hands for a year and a day. The ground of this right seems to have been, that the king when his tenant died could not tell to whom the land belonged till he was legally informed; and the tenement being then without an owner, fell naturally into the lord's hands till the heir made his claim, or as it was called sued out his livery, which, says Staundford, is most commonly within the year and the day next after the death of the tenant. (p)

(o) Stamf. Prerog. 30. a.

(p) In addition to what has been here stated in the text, it may be further remarked that although tenure *in capite* in a general sense means a holding immediately of the king without the intervention of any mesne lord; yet an important distinction obtained between tenure *in*

*capite* held immediately by grant from the crown, and such a tenure arising from the escheat of a manor, or an honour as the larger subinfeudations were sometimes called. In the former case they were called according to Madox, tenures *in capite ut de coronâ*, and in the latter tenures *in capite ut de honore*. (1) The

7. There is in Kent a peculiar kind of tenure called gavelkind, derived from our Saxon ancestors, and nearly free from all feudal relations. This kind of land was always alienable at pleasure without licence and without fine. It does not escheat for felony, and can be forfeited only by treason or outlawry for felony. (q) An heir in gavelkind at fifteen may make a contract, and sell his estate for money: but the livery upon the feoffment must be made by the heir in person; for being under age, he cannot by the common law appoint an attorney;

main distinction with reference to our present subject was that in the latter case the king had no primer seisin but relief only; and the heir did not sue a livery, but obtained the estate by a process called *ouster le main*. Moreover Lord Coke observes, that if he that held of the king by socage in chief died, leaving his heir of full age, the king had his livery and primer seisin only of the lands so holden, and not of the lands holden of others; and if the heir were within fourteen at the death of his ancestor, he neither sued livery nor paid primer seisin, either then or at any time after, because the custody of the body and of the lands belonged to the *prochein amy* as guardian in socage. The king could have no primer seisin of

land holden in burgage, because it was not holden immediately of the king *ut de coronâ*. (2)

From these burthens all tenures were relieved by the stat. 12 Ch. II. c. 24. The title of the act expresses that it was made to take away tenure *in capite*, and the first enacting clause proceeds on the same idea. But had the act been accurately penned, it would simply have discharged such tenure of its oppressive fruits and incidents, without the appearance of attempting to annihilate the indelible distinction between holding immediately of the king, and holding of him through the medium of other lords. (3)

(q) Robinson's Com. Law. of Kent, B. 2. c. 4.

(2) Co. Litt. 77.

(3) Co. Litt. 108. a. n. 5. by Hargrave.

and the custom being silent in this respect, and being like other local customs to be rigorously construed, the rules of the common law necessarily prevail. (r) If there be no testamentary disposition made, the land descends equally to all the sons; for there were no services reserved which the division of the estate could frustrate. (s)

8. There is an eighth species of tenure, called Ancient Demesne. When William the Conqueror took possession of the kingdom as a monarch, he likewise seised as proprietor all the land, which had belonged to Edward the Confessor; and in the general survey of the kingdom called Domesday Book he inserted his own immediate possessions under the title of *Terra Regis*. These lands being cultivated for the king's use, the husbandmen employed upon them according to the priority, which the feudal system always gives to the king, enjoyed privileges which were not granted to men who followed the like employments under other lords. These privileges are continued to this day to the possessors of those lands which can be proved by Domesday Book to have been then *Terra Regis* or demesne lands of the king. Their privileges are that they cannot be summoned upon juries; that they cannot without their own consent be impleaded for their lands out of the manor; and that they are free from tolls and talliages for every thing relating

(r) Robinson on Gavelkind,  
Book 2. ch. 3.

(s) Robinson Gav., Book 1. ch.  
6.

to food or husbandry. Of these privileges the reasons are easily discovered ; being employed in work immediately necessary to the king, they were not to attend as jurymen on the business of others, nor be drawn to defend themselves to an inconvenient distance from home. They were not to pay toll, because if they carried the product of their lands, what they carried was the king's ; if they carried instruments of husbandry, they carried them to be used in the king's work. There are two species of tenants in ancient demesne ; of which one is merely a copyholder. The other, called a frank tenant in ancient demesne, holds according to the custom of the manor, but not at the will of the lord. (*t*)

9. and 10. The ninth and tenth species of tenure are copyhold and villenage, of which we have spoken sufficiently, being naturally led to consider them at the same time that we treated of the duration of a copyhold estate.

There only remain to be mentioned ecclesiastical tenures, or tenures by spiritual service ; for, in conformity to the constitution of the state, the lands of the church were deemed to be held on conditions which the tenant was bound to perform. These tenures are, 11thly, Tenure in frank almoign, and, 12thly, Tenure by divine service.

11. Frank almoign, in Latin *libera elemosyna*,



means nothing more than free alms ; and tenure in frank almoign is that tenure by which an ecclesiastical person holds some possession of the church, by the free gift of the original patron, without any conditions annexed to the grant, and without any other obligation to service than what is imposed by the ecclesiastical law. (u) One of the services principally required of tenants in frank almoign before the Reformation was to pray and say mass for the souls of the grantor and his heirs. (x) They are now only bound to the performance of such duty as is prescribed by the liturgy and canons of the Church of England.

By this tenure most of the lands belonging to the religious houses were anciently held, and by this the parochial clergy and religious and eleemosynary corporations now hold most of those lands which were granted to them before the 18th year of Edward the First: but the statute *quia emptores terrarum* passed in that year, having provided that for the future he to whom lands or tenements are granted in fee shall hold them not of the grantor, but of such lord and by such services as the grantor before held them; and it being a characteristic of this tenure, that lands held in frank almoign must be held of the grantor or his heirs, it thenceforward became impossible for any subject to grant lands in frank almoign, except by licence

(u) Co. Litt. 95. 96.

(x) Litt. s. 135.

from the king, and from all the intermediate lords of whom the lands were held. (*y*) It is true that by the stat. 1 & 2 Ph. & M. c. 8. s. 54. a general licence was given to grant lands to the church to be held in frank almoign, or by divine service. But this power, if not taken away by the stat. 1 Eliz. c. 1., expired of itself in 20 years, the term for which it was created by the Legislature. So that lands given by private men to the church in later ages are in a great measure held like the possessions of laymen by lay service.

A tenant in frank almoign is so entirely exempt from temporal service, that he is not even bound to take the oath of fealty which is incident to every other kind of tenure. (*z*) So it is a rule of law, that the goods of a tenant cannot be distrained for the nonperformance of any services, but such as can be ascertained; (*a*) for otherwise the power of the lord would be arbitrary and indefinite. As therefore in frank almoign no certain and periodical service is required by the grantor as the condition of the grant, no distress can be made by the lord for the nonperformance of the service. But if the duty be not done which is exacted by the ecclesiastical law, the ecclesiastical tenant may be punished by his ordinary or visitor.

## 12. Tenure by divine service differs from tenure

(*y*) Litt. ss. 140, 141. Co. Litt.

(*z*) Co. Litt. 95. b.

99.

(*a*) Co. Litt. 96.

in frank almoign principally in this, that in tenure by divine service, the duty to be performed is always ascertained in the deed by which the tenure was created; as that certain prayers shall be said on every Friday, or a certain sum be distributed to the poor on a stated day in every year. (b) It is a consequence of this certainty that the lord may distrain for the nonperformance of the service. And it is a further consequence that a tenant by divine service may be compelled to do fealty to the lord, fealty being incident to every service for the neglect of which a distress may be made. (c)

(b) Litt. s. 137.

(c) Co. Litt. 97.

## CHAPTER VII.

## OF ESTATES UPON CONDITION.

HAVING explained those feudal conditions, to some or other of which all the real property in this kingdom is subject by the very nature of our juridical constitution, we may now consider conditions of a more particular and private kind, depending not on any general law of tenures, but on the intention of the grantor and the purport of the grant by which each particular estate or condition is created. These conditions which alone are meant, when lawyers speak of estates upon condition, are either necessarily implied in law, or expressly imposed by deed. (*a*)

First. A condition implied in law is such as necessarily follows from the nature of the estate, and of the cause or consideration for which it is enjoyed. Thus in every grant of an office, either public or private, it is implied that the grantee shall execute it with fidelity and diligence; (*b*) and therefore, if a public officer, who has the custody of records, fal-

(*a*) Litt. s. 325.(*b*) Litt. s. 378.

sifies or destroys them; or a park-keeper, whose office is of a private nature, lays waste the park; these are without doubt breaches of the condition, on which the offices were conferred, and they are thereby forfeited. (c) But in this, as in other cases, *de minimis non curat lex*; and it is not every omission of duty, or even actual offence, that will amount to a forfeiture. "There are," says Lord Coke, (d) "three causes, for which an office may be forfeited or seized. 1. Misuser or abuse. 2. Non-user. And, 3. Refusal."

1. Misuser or abuse is where some act is done<sup>\*</sup> or permitted contrary to the duty of the office, or some ill use is made of the authority with which the officer is intrusted; as if a gaoler permit his prisoner to escape. But here the rule of mitigation must be admitted which has just been mentioned; for it has been held that though one escape voluntarily suffered by a gaoler amounts to a forfeiture of his office, he shall not incur the same penalty by one escape that happens merely through his negligence. Yet if through negligence he suffers several escapes, the Court may at discretion remove him. (e)

2. With respect to *nonuser*, or neglecting the duty of an office, "there is," says Lord Coke, (f)

(c) Co. Litt. 235 b. 1 Kebl. 597. book, 39 Hen. VI. 33. & 34.

(d) 9 Rep. 50.

(f) 9 Rep. 50.

(e) 2 Roll. Abr. 155. Year

“ this distinction, that where an office concerns the administration of justice or the public good, and the officer *ex officio* ought to attend without any demand or request there by *nonuser* or nonattendance, the office is forfeited; but not where an officer is not obliged to attend without some demand or request made;” or, as he expresses it more generally elsewhere, (g) “ Nonuser of itself without special damage is no forfeiture of private offices: but nonuser of public offices, which concern the administration of justice or the commonwealth, is of itself a cause of forfeiture.”

3. Refusal to execute an office, when the officer is called upon by one who has a right to require such execution is in all cases a cause of forfeiture. As if the steward of a manor refuse to hold a court when requested by the lord. (h)

To these causes of forfeiture mentioned by Lord Coke may be added a fourth, *viz.* Insufficiency. For in every grant of an office, which requires diligence, and which cannot be performed by deputy, a condition is undoubtedly implied, that if either he to whom it is originally made, or any one to whom it afterwards comes by virtue of the grant, is unfit to perform it, the office shall be void; and it has even been said, that when the office may be performed by deputy, if the principal deposes one who

(g) Co. Litt. 233. a.

(h) 9 Rep. 50. b.

is ignorant and unskillful, this is a breach of the condition, and therefore a forfeiture of the office. (i)

Upon the same principle it is that the rights of corporations, and other franchises being granted on an implied condition, that they shall be used for the public benefit, may be forfeited, either by *mis-user* or *nonuser*; and “so,” says Lord Coke, (i) “to every estate of tenant by the curtesy, tenant in tail after possibility of issue extinct, tenant in dower, tenant for life, tenant for years, tenant by statute merchant or staple, and tenant by elegit, there is a condition tacitly annexed by the law, that if they alien in fee simple or for any longer term than by law they ought, he who is entitled to the reversion or remainder may enter upon the lands.”

Secondly. A condition expressly imposed by deed is, where an estate is granted, and in the deed of conveyance an express condition is inserted, upon the performance or nonperformance of which the commencement, continuance, or quantity, of the estate granted is to depend.

Such a condition in deed is either precedent or subsequent. A condition precedent is such as must be punctually performed before the estate can vest at all, “*quæ adimpleri debet prius quam sequatur*

(i) 4 Mod. 29. Arg.

*effectus.* (k) A condition subsequent is where the estate is immediately executed or vested, but the continuance thereof depends on the breach or performance of the condition. (l)

Thus if land be devised to Titius on his marriage with Portia, or when he shall marry Portia; this is an estate on condition precedent, which does not vest till the condition be performed, and then it becomes absolute. But if the land be devised to Titius upon condition that if he marries Catia, the heir of the devisor may enter on the land, this is an estate on condition subsequent which vests in Titius immediately on the death of the testator; but is at any time subsequent liable to be defeated by the violation of that law which the testator has imposed on him. So if land be given to a man and his heirs subject to a rent, and a condition is expressed in the deed, that if the rent be not duly paid, it shall be lawful for the donor and his heirs to enter on the land: this is an estate on condition subsequent, and is in law defeasible, if the condition is not performed. And to the same head may be referred those fees simple conditional, which subsisted before the statute *de donis conditionalibus*, and which may still subsist in a personal annuity granted to a man and his heirs, or in any other hereditament, which not being land or a tenement, is not included in that statute.

(k) Co. Litt. 201. a.

(l) 1 Eq. Ca. Abr. 108.



A condition cannot be expressed in a deed which is inconsistent with the estate granted ; therefore a condition that the grantee of an estate in fee simple shall not alien, or that a tenant in tail shall not suffer a recovery, is void, the law considering such powers as inseparably characteristic of such estates.

Although in all these cases nonperformance of the condition is in strictness of law a forfeiture or defeasance of the estate, yet it is now become a standing rule in the Court of Chancery that wherever a pecuniary compensation can be made for the breach of a condition subsequent, in a deed, and he who has broken the condition offers satisfaction, no advantage shall be taken of the forfeiture. (*m*) And even in some cases in which compensation can have no place, a Court of equity will not allow a violation of a condition to induce an actual forfeiture of the estate, if there be any reason for supposing that he who imposed the condition would have remitted the forfeiture. For if an estate be devised to a daughter, on condition that if she marries without the consent of I. S. the devise shall be void ; without more, this condition is considered in equity as only imposed by the parent *in terrorem* ; and the daughter will retain the estate although

(*m*) 1 Eq. Ca. Abr. 108, 109. & Bea. 24. White v. Warner, 2 See stat. 4 G. II. c. 28. Hill v. Meriv. Ch. Ca. 459. Reynolds v. Barclay, 16 Ves. 462. 18 Ves. 56. Pitt, 19 Ves. 141. Lovat v. Lord Ranelagh, 3 Ves.

she contravenes the terms of the devise. (n) But if the estate is in the case of the daughter's disobedience limited over to another person by name, then her breach of the rule prescribed transfers to that other person a positive right, and an immediate property. (o) It seems to be the opinion of courts of equity, that where no one is particularly named, it cannot be considered as the desire of the testator that the forfeiture should be exacted: but that where the condition names two, it is plain that they both shared the kindness of the testator, and that he wished the welfare of the one in the first place, and of the other in the second. Where, upon the failure of the condition prescribed, the devise or legacy stands unsettled by any determination of the testator, though there be an heir who can produce a claim to such of the testator's lands as are not otherwise disposed of, yet since he is an heir merely by the casualty of succession, an heir made by the law and not by the testator, it is conceived, that though by the breach of the condition the testator's intention is not wholly fulfilled, yet that more of it will be still retained by keeping the property in the hands for which it was primarily designed than by suffering it to devolve to one whom the testator

(n) 1 Vern. 20. 2 Vern. 293.  
See also *Marples v. Bainbridge*,  
1 Madd. Cha. Ca. 590.

(o) 2 Vern. 357. A mere residuary bequest is not sufficient: but a direction by the testator that the legacy shall fall into the

residue is. See *Lloyd v. Branton*, 3 Meriv. 108. If the condition became impossible by the act of God, the estate is absolute. *Aislabie v. Rice*, 3 Mad. Ch. 256.—EDITOR.

seems not to have had in view, and whom therefore, if he had made a secondary provision, he would probably have set aside.

Having thus considered the general nature of estates upon condition, there remain to be mentioned some particular sorts of estates upon condition expressed in deed, which are chiefly in use as securities for money, and have acquired peculiar names. These are estates in mortgage, estates by statute merchant and statute staple, and estates by *elegit*.

To begin with mortgages.

The notion of mortgaging and redemption was familiar among the Jews, and from them is supposed by some to have been derived to the Greeks and Romans. (*p*) From the Romans the Norman and English seem immediately to have derived it; and it may therefore be proper to consider the distinctions made by the civil law between *pignora*, or pledges strictly so called, and *hypothecæ*, or things hypothecated.

*Pignus*, or a pledge, was any valuable thing, which, being by the consent of its owner subjected to his creditor as a security for a debt, was for that purpose delivered to the creditor. *Hypotheca* was

that which was bound in like manner, as a security for a debt, but of which the possession remained with the debtor.

In the case of goods pignored, the creditor was obliged to the same diligence in keeping them as he used about his own ; so that if the goods were lost by the negligence of the creditor, an action lay as for a deposit ; for the property being transferred to the creditor for a particular purpose, he was to keep them as his own.

If the debtor did not redeem the thing pledged, the creditor might in both cases foreclose the right of redemption, which belonged to the debtor : if the money was not paid, the creditor had his *actio pignoratitia*, or *hypothecaria* ; and when he had pursued it, and obtained sentence thereon, he might sell the pledge as his own property. But there was this difference between the *actio pignoratitia* and the *actio hypothecaria*, that the *actio pignoratitia* operated only on the person of the debtor to foreclose him, because the *pignus* was already in the possession of the creditor : but the *actio hypothecaria* was *tam in rem quam in personam*, and was given *ad pignus prosequendum contra quemcunque possessorem* ; (q) because in this case the creditor had not the possession of the pledge, but it remained in the possession of the debtor. Therefore, until sentence was obtained in this action,

(q) Dig. Lib. 20. tit. 6.

the creditor could not obtain the property of the pledge. If the money was paid before sentence, the pledge was subject to redemption; and where the same thing had been pledged to several, those were said to be *potiores in pignore* to whom the things were first hypothecated.

If the money was tendered or paid to the creditor, the contract of pignoration was dissolved, and the debtor might have the pledge back as a thing lent, which seems to have introduced the notion among us of the debtor's right to redemption: and with them the *usucaption* or the right of prescription did not extinguish the pledge or *hypotheca*, unless a stranger had held it for thirty years, or the debtor for forty (*r*).

In the feudal law the general rule was that feudal property could not be pledged without the consent of the lord, and such relations of the tenant as might possibly inherit (*s*). The reasons why *alienation* was thus restrained have been already shewn; and the same reasons may with equal force be applied to *oppignoration*: for, if the land be mortgaged to its full value, this differs from a sale rather in name than in effect. “*Quicquid prohibitum in termino prohibitum est etiam in viâ; et per oppignorationem ad alienationem devenitur* (*t*).

(*r*) Dig. Lib. 20. tit. 6.

Lib. 2. tit. 2. s. 29.

(*s*) Struvii Synt. J. Feud. c.

(*t*) Stryk. Exam. J. Feud. c.

13. s. 7. Craig. de J. Feud. 19. Qu. 8.

But when in England these restraints began to wear away, and it became a maxim in law that the purity of a fee simple imported a power of disposing of it as the owner pleased ; there were two ways of mortgaging introduced, which our lawyers distinguish by the names of *vivum vadium*, and *mortuum vadium* ; or, in the language of the grand Customier of Normandy, *vif-gage*, and *mort-gage*.

*Vivum vadium*, says Lord Coke, is where a man borrows 100*l.* of another, and makes an estate of lands to him, till he hath received the said sum out of the issues and profits of the lands ; and it is called *vivum vadium* because neither the land nor the money dieth : for the land is constantly paying off the money, and the land is not left as a dead pledge in case the money be not paid<sup>(u)</sup>. This seems to have been the ancient way of pledging land ; for it was held that lands could not, like the Roman *hypotheca* and our modern mortgage, be pledged as a security for money, and yet continue in the hands of the borrower. They used, therefore, to deliver to the creditor the *ususfructus*, or profits, originally only during the life of the feudatory ; and when afterwards there was a free liberty given of alienation, then the feudatory could pledge the profits of the land at pleasure. But because in this way of pledging the lender received his money

(u) Co. Litt. 205.

by degrees, and in small parcels, which was very troublesome, and those that put out money to usury are in general willing to receive the principal again in a gross sum, the practice of making *viva vadia* is now out of use (*x*).

*Mortuum vadium*, or mortgage, says Littleton, is so called, because it is doubtful whether the feoffor will pay the money at the day limited or not; and if he do not pay it then, the land, which is but a pledge upon condition for the payment of the money, is taken from him for ever, and so is dead to him; and if he do pay it, then the pledge is dead to the tenant of the land (*y*). In speaking of this kind of estate, the borrower, who conveys his estate subject to a condition of redemption, is called the mortgagor, and he to whom it is conveyed or mortgaged is called the mortgagee.

Mortgages may be made either—

Of the freehold and inheritance.

Or for a term of years.

1. In mortgaging the freehold and inheritance the ancient practice was, that the borrower made a charter of feoffment of the land to be mortgaged on

(*x*) Co. Litt. 205, Mod. Form. Angl. 130.

(*y*) Litt. s. 382.

condition that if he or his heirs paid the sum borrowed to the feoffee or his heirs at a stipulated time, he should re-enter and re-possess the land. And this condition was sometimes contained in the deed of feoffment itself: sometimes in another deed called a deed of *defeasance*, because its purpose was to defeat or undo what had been done by the deed of feoffment, which in this case had the form and appearance of a simple and absolute conveyance (z). But in such cases it was necessary that the deed of defeasance should be executed at the same time with the deed of feoffment, or at least before livery of seisin; for otherwise the deed having the form of an unconditional grant, and the livery before the peers of the feudal Court or with us before the inhabitants of the county, being evidence of the infeudation, the feoffment or conveyance was thenceforth irrevocable, and could not be affected by any subsequent act of the feoffor. But the grant of an annuity, a rent-charge, or other incorporeal hereditament, which being incapable of actual delivery is conveyed by grant alone, may be defeated by a deed of defeasance made at the time of its creation, or at any subsequent time, provided the truth of the transaction appears: for as such hereditaments are created by deed alone, they may by deed alone be defeated or destroyed. The method here described is still legal, and may be practised: but, as in absolute conveyances of freehold

(z) See *Mad. Form. Angl.* 318, 319.



estates, deeds of feoffment with livery of seisin are not much in use, having given way in great measure to the more modern mode of transferring property, by means of conveyances to uses; so likewise a mortgage of the inheritance is usually constituted by the same instrument, and the condition, that the conveyance shall be void on payment of the debt, is usually inserted in the body of the deed transferring the inheritance.

2. Mortgage terms, as they are called, originally introduced for other reasons, are now continued in practice chiefly because in the mortgage of the inheritance on the death of the mortgagee, the legal estate which was vested in him descends to his heir, whereas the debt, for the security of which that estate was granted, passes to his executor for the benefit of those who are entitled to his personal estate; and therefore Courts of equity consider the heir as trustee for the personal representative. Whereas a mortgage term being itself a chattel interest passes at once on the death of the mortgagee to his executor with the rest of his personal property; whereby family disputes and expensive applications to Courts of Equity are frequently avoided.

There is an important question stated by Selden in his *Table Talk* (a)—Whether he who lends to

be repaid on a certain day, upon a mortgage of land worth twice the sum, may with good conscience upon future payment take and keep possession of the land? He answers, that if the land be mortgaged merely as a security for the money, the mortgagee upon payment must restore it, though the day be lapsed: but if the bargain be so, that if the money be not repaid, the land shall be forfeited, be its value what it will, the mortgagee may with a safe conscience keep it; for in these things all the obligation is *servare fidem*. The first of these cases he considers as the act of giving a pledge; and the second as that of laying a wager. The pledge when it has answered its purpose, must be restored: but a wager of whatever odds when once lost is lost for ever. Our Courts of Equity consider mortgages in the first point of view: and to the maxim of the civil law *volenti non fit injuria*, they in this and many other cases add a very reasonable restriction, by supposing that *nemo vult sibi injuriam fieri*; that he who has made a contract apparently and unreasonably disadvantageous to himself, was either oppressed or deceived; either did not see the consequences of his own act, or was not at liberty to act by choice. And as it is the great duty of the law to protect the weak against the strong, every man is to be rescued from those who delude his ignorance, or prey upon his distress. For this reason mortgages are now universally considered only as pledges or securities for money; and as it can seldom happen that any other purpose

could on both sides be reasonable, no other purpose is now supposed: so that there always remains to the mortgagor an equity of redemption, that is, a right which equity gives him in opposition to rigid law, of recovering the possession of his estate by re-payment of the sum for which it was pledged. This equity is extended in general to the heirs or the assigns of the mortgagor, who were in one case (*b*) adjudged to be entitled to the equity of redemption, although it was stipulated in the deed of mortgage that the lands should not be redeemed but by the mortgagor himself, or the heirs male of his body.

The predominance of the equity of redemption is such, that the mortgagor is usually permitted to retain the possession, and is always conceived to have the superior property; he may, therefore, dispose of the property by deed or will. And it has been enacted by different statutes that the mortgagee shall not consider himself by his right in mortgaged lands as gaining or enlarging a qualification either to sit in parliament, or vote for a representative there.

But as property cannot always be held in suspense, there is a time when lands mortgaged are equitably supposed to be forfeited, and there are means by which the property may be completely

(*b*) *Howard v. Harris*, 1 Vern. 33. 190.

vested in the right owner. The time at which the land shall be forfeited has never been absolutely determined, as the case is liable to indefinite variations. One of the lord keepers declared, however, that he would never enable a mortgagor to redeem his land after a lapse of twenty years, without payment of interest, that being the time limited by law for any person ousted of his estate to re-enter, or bring his action of ejectment. This rule is for the most part reasonable, but is not universal (*c*). The method by which the property is to be finally settled is by a bill in Chancery, either on the part of the mortgagee to summon the mortgagor to make his payment on pain of being foreclosed, *i. e.* barred of all future claim; or on the part of the mortgagor to oblige the mortgagee to accept principal and interest, and reconvey the property to him.

But since after default of payment in the mortgage money, at the time limited by the mortgage deed, the estate is absolute at law in the mortgagee, the mortgagee is in law considered as the owner of

(*c*) It is now decided that twenty years' possession by a mortgagee will *prima facie* bar the right of redemption; and it will lie on the mortgagor to shew that such length of time ought not to produce that effect. As that the mortgagor laboured under disabilities, such as infancy or coverture, or was beyond sea; or that the mortgagee by

receiving interest, stating an account or some other act, shewed that he considered the mortgage as existing. Parol evidence, if admitted, should unequivocally shew an intention in the mortgagee to allow redemption. *Reeks v. Postlethwaite*, Coop. Ch. Ca. 161. *Barron v. Martin*, *ibid.* 189.—EDITOR.

the property. The mortgagee, therefore, may at any time gain actual possession of the property, although by the rules of law he must establish his right by an action of ejectment. And by the stat. 7. Geo. II. c. 20. it is enacted that if an action of ejectment at law is brought by the mortgagee for the possession of the lands mortgaged, the mortgagor paying the money due into Court with interest and costs shall keep his lands, and obtain a rule of Court to oblige the mortgagee to do that for which a decree in Chancery was formerly necessary.

Estates by statutes merchant and statutes staple, which likewise are securities for money affecting the land of the debtor, convey a conditional estate therein to the creditor. Both these securities as to form are bonds acknowledged before officers having authority for that purpose, and inrolled in a court of record; and they are called statutes, because both the form and effect of them are established by positive acts of parliament passed in favour of mercantile creditors. Great attention has always been paid in this kingdom to the security of commerce. Freedom of trade and the personal safety of merchants are provided for by Magna Charta, and the first great relaxations of the power of alienation were those of which we are now to speak.

A statute merchant was first established by the

statute of Acton Burnel, 11 Edw. I. and that *de mercatoribus* 13 Edw. I. stat. 3. and is "a bond of record acknowledged before one of the clerks of statute merchant, and mayor of the city of London, or two merchants of the said city for that purpose assigned; or before the mayor or warden of the town or other discreet men for that purpose assigned." This recognizance is to be entered on a roll which must be double: one part to remain with the mayor and the other with the clerk, who shall write with his own hand *a bill obligatory*, to which a seal of the king, for that purpose appointed, shall be affixed together with the seal of the debtor; and this subjects to the demands of the creditor not only the goods and the person, but the land likewise of the debtor into whose soever hands they come after the statute acknowledged. Therefore if the person of the debtor be only taken in execution on a statute, and then he dies, his goods and lands are still liable to the extent, because being all liable at first to satisfy the creditor, he may at discretion take them all at one time or at several. (*d*)

The statute staple is a bond of record acknowledged before the mayor of the staple in the presence of all or one of the constables. "To this end, says the stat. 27 Edw. III. c. 8. there shall be a seal ordained which shall be affixed to all obligations made on such recognizances acknowledged in the staple."

This seal of the staple is the only seal the statute requires to attest this contract, and is appointed to be kept by the mayor of the staple. To understand a little of the origin and constitution of the staple, we must observe that the place whither the merchants resorted with their staple commodities was anciently called *estapel*, which signifies no more than mart or market; and this was formerly appointed at several eminent trading towns on the continent, as at Calais, Antwerp, and other ports, which were nearest to us. But besides these staple ports appointed abroad there were others appointed at home, whither all the staple commodities, but chiefly the produce of our woollen manufactures, were carried in order to their exportation; such as London, Westminster, Hull, and Newcastle. At these staple ports the king's customs were collected, and were by the officers of the staple at two several payments returned into the exchequer. Moreover at these staple ports all merchants' goods were carefully viewed and marked by the proper officers of the staple, which prevented the exportation of decayed goods or illwrought manufactures; and consequently fixed a stamp of credit on merchandise so exported. (e)

Hence it appears that this security was only designed for the merchants of the staple, and for debts only on the sale of merchandise brought

thither ; yet in time others began to apply it to their own ends ; and the mayor and constable took the recognizance from strangers, surmising that they were made for payment of monies for merchandise brought to the staple. To prevent this fiction, from which some mischief was apprehended, the parliament in 23 Hen. VIII. reduced the statute staple to its former channel, and laid a penalty of 40*l.* on the mayor and constables who should extend the benefit of the statute to any but those of the staple. But though the stat. 23 Hen. VIII. c. 6. put an end to this practice, it framed a new sort of security to be used *ad libitum* by all men; known by the name of “ a recognizance in the nature of a statute staple,” so called because this act limits and appoints the same process, execution, and advantage, in every particular as is set down in the statute staple. (*f*)

Lastly, there is a species of conditional estate called an estate by *elegit*, which is that interest that a creditor acquires in the land of his debtor after having obtained judgment against him by means of a writ of execution called an *elegit*. This writ is founded on the stat. Westm. the second 13 Edw. I. c. 1. which enacts that when a debt is recovered or acknowledged in the king’s court, it shall be in the *election* of the creditor either to have a process merely against the goods of the debtor,



or to have his chattels and one half of his lands delivered to him, and to receive the profits thereof till his debt is thereby satisfied. This election is expressed in the writ in this manner: *Idem A.* (the plaintiff) *juxta statutum inde editum elegit sibi liberari omnia catalla et medietatem terræ, &c.*: Hence the estate obtains its name of an estate by *elegit*.

These estates by *elegit*, as well as the estates by statute merchant and statute staple, are in the nature of *viva vadia*, to be retained no longer than till the rents and profits have discharged the debt. They are considered as less than freehold, and are therefore usually classed with estates for years and other chattels real.

## CHAPTER VIII.

## OF JOINT ESTATES.

THE regulations of joint property or mingled possession make a very important part of legal institutions ; it being necessary for every man to know how much he may be injured or profited by the actions of another, what property is united and what is distinct, and by what means he may disentangle himself from any inconvenient or dangerous connexion.

Property may be jointly possessed—

- I. By parceners.
- II. By joint tenants.
- III. By tenants in common.

I. The first species of joint property, that which is enjoyed by parceners, is called an estate in coparcenary. Coparcenary is a community of inheritance, which happens when a man possessed of lands dies without male heirs ;—so that his heirs are women, all related to him in the same degree,

as daughters, sisters, or aunts, in whatever number. These are considered all together as one heir ; and are called parceners according to Littleton, (a) because they are always liable to a writ *de partitione faciendâ*, by which, at the request of one or more, the rest shall be compelled to divide the inheritance.

This law of partition we seem to have derived from the Normans, among whom land not subject to wardship, or which is the same thing, land not held by military service, was partible in some cases among the sons like gavelkind lands, and in others among all the children, whether sons or daughters : but lands held by military service, called by them *fiefs d'Haubert et Sergenteries*, descended, if there were sons, to the eldest only ; and for default of male heirs, were divided equally among the females. (b)

The reason for which the land, that would have descended entire and undivided to the eldest son in exclusion of the younger, shall be thus parted amongst the daughters, arises from the nature of feudal tenure. All land being supposed to have been originally granted in consideration of some service which for the most part a man only could perform, the rights of the lord were best secured whilst the land was in one hand ; and it descended

(a) s. 241.

rier's Comment. du Droit Civil

(b) Grand Custum. c. 26. Ter-

de Normandie, Liv. vi. c. 3.

for the same reason to the eldest, because the eldest was soonest able to perform the service. But when the land necessarily fell into the hands of women, they enjoyed it equally without injury to the lord, because a *single heiress* could not have performed the service, and the coparceners could combine in finding a substitute.

Coparceners may, while they agree, hold the inheritance in common: but marriage, or some other reason, makes it for the most part convenient to divide it. The division, called in law *partition*, may be either amicable or compulsory. Of amicable divisions Littleton has not thought it unnecessary to describe several methods. One is when the parceners make partition among themselves, without the intervention of any other person, and each goes away with her own part. (c) Another is when they fix upon some friends to divide the land into equal shares. In this case the eldest regularly chooses first, and the rest in order of birth. (d) That part which the eldest chooses is called in the language of the law *pars eisnetia*, from the French word "*eigné*," signifying eldest. But if the province of division be given to the eldest, it is then held that she shall choose last, it being a very just maxim of the law that *cujus est divisio, alterius est electio*. (e) Another mode is, when the division is made, to choose by lots. (f)

(c) Litt. s. 243.

(e) Co. Litt. 166. b.

(d) Litt. s. 244.

(f) Litt. s. 246.

When the division is compulsory, that is, in consequence of a writ *de partitione faciendâ* sued out by any of the parceners, if upon trial the plaintiff's claim to such a writ be found to be just, the judgment is that the sheriff shall survey the land in person ; and, assisted by a jury of twelve men, shall make an equal partition, and give to each her part without respect to seniority. By the stat. 8 & 9 W. III. c. 31. this may be done by the undersheriff and a jury in the presence of two justices of the peace.

The proceedings on a writ of partition were before this statute clogged with many difficulties. One impediment arose from the difficulty of discovering a tenant or defendant to the action ; it is therefore enacted by the same statute, that if a copy of the writ be left forty days before the return, either with the tenant to the action, or with his wife, son or daughter, or with the tenant in possession, *i. e.* the immediate farmer or occupier of the land, if the tenant to such writ shall not appear within fifteen days, the Court may examine the claim of the demandant, give judgment by default, and award a partition. But if the defendant shall within a year complain to the Court of any inequality, the Court may award a new partition : but till a new partition is awarded, all parties may enjoy their shares in safety ; for an unequal distribution, though it makes the partition voidable, does not make it void ; which security was likewise conferred by the com-

mon law on a partition made, while one of the par-  
ceners was a feme covert or a minor (*g*).

The stat. 8 & 9 W. III. c. 31. at first temporary, was made perpetual by the stat. 4 & 5 Ann. c. 18. but notwithstanding its provisions, as the property to be divided is seldom totally disencumbered of trusts or settlements, it has been generally found expedient to file a bill in Chancery, in consequence of which the different claims are adjusted, and the land is divided by commissioners appointed by the Lord Chancellor. (*h*)

There is another species of partition, which previously requires a re-union of separated property. This re-union is in law termed *hotchpot*, a term used when one of the coheiresses having previously received a portion of her ancestor's land in frank-marriage, makes a demand after his death of a share of the remaining part. In this case she must put her land into *hotchpot*, to make that and the lands, of which she claims a part, one mass to be divided between her and her sisters. (*i*) This is a provision wholly in favour of the claimant; for if she has less than her sisters, she can by putting her land into *hotchpot* take an equal share; but if she has more, the sisters cannot compel her to reduce herself to an equality, because this would nullify the intention of the donor, who it is supposed had

(*g*) Litt. ss. 256, 258. Co. Litt.

(*h*) See 2 P. Wms. 519.

171.

(*i*) Bract. fol. 77. a.

the election how much he would give in frank-marriage (*k*).

Besides the general and legal parcenary, incident to real estates at the common law, there is another which is local and particular, almost wholly confined to the county of Kent, and called parcenary by the custom. This happens where lands are held in gavelkind, and descend equally to all the sons ; in which case the writ *de partitione faciendá* may be sued out by any of the sons, who are here the parceners : but it is necessary, according to Littleton, that in the declaration the custom be specially mentioned. (*l*)

It will be now proper to observe what rules have been established respecting this kind of inheritance which seems naturally liable to some uncertainty and confusion.

I. Some things are in their own nature indivisible, upon which the writ of partition cannot operate ; such as a title of honour, or an advowson, or the right to present to an ecclesiastical benefice. Titles of honour, when they descend to coparceners, fall into abeyance, a state of expectancy in which they are dormant, but not extinct ; and though they are for the present without effect, retain a possibility of revival by royal nomination ; for in that

(*k*) Bract. fol. 77. a.

(*l*) Litt. s. 265.

case the king who is the sovereign of honour and dignity may for the uncertainty confer the dignity upon which of the daughters he pleases. (*m*) But there is a difference, says Lord Coke, between a dignity or name of nobility, and an office of honour; for if a man hold a manor of the king to be high constable of England and die, having issue two daughters, and the eldest taketh husband, he shall execute the office solely, and before marriage it shall be exercised by some sufficient deputy (*n*). Where there is an advowson, if the parceners cannot agree whom to present, the first turn is by law given to the eldest, and then to the rest in order of seniority (*o*).

2. The succession in coparcenary may be either *in capita* or *in stirpes*, either to persons or to families. When a man's estate descends for example to two daughters, it descends *in capita*; if it comes to the children of his daughters, it descends *per stirpes*, a metaphorical expression, by which a family is considered as resembling the trunk of a tree spreading into branches. As the branches can derive no nourishment but through the trunk, so the successors in coparcenary, however numerous, can receive only what belonged or would have belonged to their immediate ancestor. Thus, if a man has two daughters, by the eldest of which he has six grand-daughters and by the younger two;

(*m*) Co. Litt. 165. a.

(*o*) Co. Litt. 166. b.

(*n*) Co. Litt. ib.



which daughters dying before him leave the grandchildren to inherit, the six inheriting through the eldest shall have no more than the two inheriting through the younger: for the mother being the stock through which they inherit, either race can only have their mother's share. If either of the daughters leave a son, he will inherit the whole of his mother's share: but he is a parcener with the children of the other sister.

II. The second species of mingled property is an estate in joint-tenancy. This can only arise by purchase, for that community of possession which comes by inheritance is not joint-tenancy but coparcenary.

Joint-tenants must all claim by the same title at the same time; for those who obtain a community of possession by different titles at different times, or with different degrees of interest, are not joint-tenants but tenants in common. Thus if a man possessed of an estate shall for a price paid, or any other consideration, make a conveyance of such an estate to two or more persons and their heirs, those persons become joint-tenants; and in all legal proceedings respecting that estate are to be considered as one individual. So that a suit against either must be a suit against both, and a suit by either must be prosecuted by both. Joint-tenants are, as Littleton expresses it, seised *per my et per tout*, through half and through the whole; that is,

each has half the interest through the whole possession ; so that neither can say of any part this is mine and that is his, for the tenancy is one, though the tenants be many.

From this inseparability of interest arises the right of survivorship ; for all the tenants being but one person, survivorship is only a continuity of duration : yet the survivor is not properly heir to him that died, but now holds singly what they before held together. This right of survivorship is the leading characteristic of joint tenancy, he that outlives his companions having always an accruing interest which the Roman lawyers and our ancient writers after them called *jus accrescendi*, that is, a gradual concentration of property from more to fewer, by the accession of the part of him or them that die to the survivors or survivor, till it passes to a single hand, and joint tenancy consequently ceases. (*n*)

Hence it appears that to all but the ultimate survivor joint tenancy in fee in effect can only be an estate for life, although the estate was first conveyed to all and the heirs of all ; for the interest of each ceases with his life. For the same reason the wife of a joint-tenant cannot be endowed as long as the joint-tenancy continues, for dower is not perfected till the death of the husband ; and then the

(*n*) Dig. lib. vii. tit. 2. Fleta, lib. iii. c. 4.

right of the survivor is paramount or prior to that of the wife, because his claim is founded on the deed by which the estate was originally created. And the same principle is applicable to all charges of each joint-tenant which do not affect or make any change in the possession of the land in joint-tenancy. (o)

One of any number of joint-tenants may however in his lifetime sell or alien his interest, in which case the original joint-tenant and the alienee will become tenants in common, and the right of survivorship will cease. But as a joint-tenant (as such) can have no heirs, so he can make no will ; for, the survivor claiming by the original deed, his title is paramount the will which takes effect only at the death of the testator. Hence the rule of law *jus accrescendi præfertur ultimæ voluntati*. (p)

The right of survivorship is necessarily reciprocal : for otherwise there would be different degrees of interest in the same estate, which is inconsistent with the nature of joint-tenancy. A body corporate therefore, whose existence has no natural termination, cannot be joint-tenant with a natural person ; and as survivorship is necessarily included in joint-tenancy, two corporations cannot be joint-tenants together ; for both being considered by the

(o) Co. Litt. 31. b. 3 Rep. 27.

(p) Co. Litt. 185. b.

b. Cro. Eliz. 503.

law as of perpetual duration, it is impossible for one to survive the other. (q)

It is held that there may be a joint-tenancy not only of lands and tenements, but of chattels whether real or personal: as men may be joint-tenants of a lease for years, or joint-owners of a horse. (r) But it has been determined by courts of equity, that no mercantile partnership shall make a joint-tenancy of the stock in trade: the rule of the *lex mercatoria* which originally and by the common law operated only upon foreign trade, or the affairs of merchants strictly so called, being now extended by the Court of Chancery to all commercial transactions. Thus in *Jeffereys v. Small* (s) two persons had jointly stocked a farm, and occupied it as joint-tenants; one died, and the other claimed the stock by his right of survivorship. It was proved that the deceased being informed what would be the consequence of his death, declared himself willing that the survivor should possess the stock. But the Lord Keeper determined that a moiety of the stock should go to the representative of the deceased; observing that though it is common for traders in articles of co-partnership to provide against survivorship, yet it was by no means necessary; and he said he took the distinction, that where two become joint-tenants or jointly interested in a thing by way of gift or the

(q) Co. Litt. 189. b. 190. a.

(s) 1 Vern. 217.

(r) Litt. s. 281.

like, there the same shall be subject to all the legal consequences of joint-tenancy: but as to a joint-undertaking by way of trade or the like, it is otherwise.

III. The last species of joint possession is called tenancy in common; which resembles joint-tenancy in this, that the same lands or tenements are held at once by several persons; yet it differs from it both in cause and effect. That which makes joint-tenants is the identity of title and interest: but tenants in common have different titles or different interests. Joint-tenants of the fee or freehold have only one freehold: but tenants in common have each a distinct freehold. Of a joint-tenancy what is left by the death of one accrues to the survivor: but a tenant in common may bequeath his share by will, or by death transmit it to his real or personal representatives.

“Men may become tenants in common,” says Lord Coke, “by purchase, by descent, or by prescription.” (u) On which it may be observed that tenancy in common cannot *begin* by *descent*; a community of possession commencing originally by descent being always coparcenary. But as tenancy in common is inheritable, if two tenants in common leave two heirs, those heirs likewise will be tenants in common, and may be said to become so by descent.

(u) Co. Litt. 188. b.

With respect to tenants in common by purchase, the rule laid down by lawyers to distinguish them from joint-tenants is this: either that the conveyance limits the estate to them expressly as tenants in common; or, secondly, that a moiety or other undivided part be limited to one, and the other moiety or other undivided part to another; and the most usual way is to insert in the deed both affirmative and negative words expressly directing that they shall hold as tenants in common, and not as joint tenants. In wills, which are interpreted with greater laxity, many words will make a tenancy in common, that in a deed would produce a joint tenancy. Thus a devise to two equally and their heirs, to five their heirs and assigns share and share alike, or to two and their heirs equally to be divided, will make a tenancy in common, though each of these forms in a deed would make an estate in joint tenancy. (x)

(x) *Lewis v. Cox*, Moor. 558.  
2 Roll. Abr. 89. *Clerk v. Clerk*,  
2 Vern. 323.

To this account of tenancy in common by purchase it may be added that in modern times it is not unusual in settlements and wills to give to a tenancy in common an incident in some respects similar to the survivorship of joint tenancy by limiting the estate to any number of persons in tail with cross-remainders between them:

so that there may be a species of survivorship to them and the heirs of their bodies after default of issue of any of them capable of inheriting the estate tail. Where the words of the will are not explicit, Serjeant Williams states it to be a settled distinction that the presumption is in favour of cross-remainders between two and no more: but where they are to be raised between more than two, the presumption is against cross-remainders. But such presump-

Tenants in common by prescription, says Littleton, (*y*) are when he that has one moiety and his ancestors have holden in common with the other tenant which has the other moiety and his ancestors time out of mind, which time is now limited by statute to the reign of Richard I. of grants before whose reign no evidence is permitted to be given in our Courts. As however all prescriptions originally imply some grant, tenancy in common by prescription may well be reduced to tenancy in common by purchase.

tion may be answered by circumstances of plain and manifest intention either way. There are two reasons assigned against implying cross-remainders between more than two: one is that the law intended to prevent as well the confusion which it is said would follow from the division of the estate among many, as the uncertainty which would arise whether the surviving shares should vest in them as joint tenants or tenants in common, and for what estate. The other which is a technical reason is, that it was to avoid the splitting of tenures. Cross-remainders may be created by deed: but then it must be by express words; for it is a fundamental rule that cross-remainders cannot be implied in a deed. No technical form is

necessary: but the usual form is the following, "And in case there shall be failure of issue of the body or bodies of any of the said tenants in common, then as to the part or parts as well accruing and surviving as original of such of them whose issue shall so fail to the use of the survivors or survivor, and other or others of them equally to be divided between, if more than one share and share alike as tenants in common, and of the several and respective heirs of the body and bodies of such surviving and other daughter and daughters. And if all such tenants in common but one shall die without issue, then to the use of such one and of the heirs of his or her body." (1)—EDITOR.

(*y*) s. 310.

(1) See 1 Saund. 185. a. n. 6, by Serjt. Williams.

Both tenancy in common and joint tenancy originally differed from parcenary, in that they were liable to the writ *de partitione faciendâ*: but this distinction is taken away by the stats. 31 Hen. VIII. c. 1. & 32 Hen. VIII. c. 32: which to the power that joint tenants and tenants in common always possessed of making a voluntary partition of their property, have added that of compelling the partition when any of them shall think it desirable. The method of compulsion is the same as in the case of parceners, and the partition is made in the same manner. The stat. 32 Hen. VIII. c. 32. gives this right to persons having limited interests for life or years; and whatever the inconvenience of such partial partitions may be, such right has been recognised by our Courts of equity. (z)

In conclusion it may be remarked that joint-tenancy was rather favoured by our ancient lawyers than tenancy in common; because the estates of tenants in common might long remain the property of several owners, whereas those of joint tenants were always by the course of nature hastening to a re-union and facilitated the observation of feudal duties. For this reason all ambiguous words were anciently interpreted in favour of joint tenancy; and as custom often makes law, the prejudice remained when the reason had ceased. How the disposition of the Courts has been changed may

(z) See *Baring v. Nash*, 1 Ves. & B. 555.



be stated in the words of Lord Hardwicke. “ Before the abolition of tenures Courts of law favoured joint tenancy to prevent the multiplicity of tenures and the division of services : but since tenures have been abolished, Courts of law have favoured tenancy in common, because of the inconvenience of survivorship. Courts of equity always favoured tenancy in common, as well before as after the abolition of tenures ; because it is a more complete provision for the tenants, and is not liable to be defeated by accidents.” (a)

(a) From a MS. note.

## CHAPTER IX.

## OF OUSTER.

INJURIES to real property are either such as amount to dispossession, or such as do not. The latter are those injuries which usually come under the denomination of trespasses ; and as they are merely temporary, and do not affect the devolution of the right of property, it will not be necessary to explain their nature more particularly on the present occasion.

Wrongs to real property, which amount to dispossession, or as it is termed in law an ouster, are of a more serious kind ; because the visible possession of property carries with it, in the eye of the law, the presumption of right ; and since it would create endless confusion if the power of questioning that right should be permitted to any other person than the right owner, the law has determined that the wrong-doer shall be considered as having a rightful possession against all the world, except such right owner. With respect also to all the world but the rightful owner, the wrong-doer is considered as having an estate in

fee-simple in the property by purchase ; and in his hands it is subject to all the incidents of such estates. Nor could it well be presumed that his estate is less than an estate in fee-simple ; because the ouster having no reference to the quantity of estate in the person dispossessed, and the presumption of title arising only from the fact of possession, the law must necessarily attribute to the possession a title to the most ample estate of which the possessor is capable, till the contrary is shewn.

The wrongs that may be done to a right of freehold in this way are five,—

1. Abatement.
2. Intrusion.
3. Disseisin.
4. Discontinuance.
5. Deforcement.

1. *Abatement*, from the French "*abattre*,"\* signifies primarily the act of *beating down* ; and is sometimes used by our old lawyers in a literal sense, as when they say "*a castle was abated*," or when they speak of abating a nuisance : and sometimes in a metaphorical sense, as that "*a writ is abated*," that is, "*rendered ineffectual*." (a)

(a) Co. Litt. 277, a.

The abatement of a freehold is the act of crushing or overbearing the just claim of the heir or devisee of him who died seised of an estate of inheritance. It may sometimes happen that a man may die seised of a freehold of inheritance, when his heir or devisee is at a great distance ; and in times when there was no easy communication between distant places, he that was not at hand might be long before he heard of the devolution of his inheritance ; so long that a stranger might enter upon the land, and take possession as of something that had no owner, This injurious occupancy was called an *abatement*, and the unlawful occupier an *abator*.

2. *Intrusion* differs from abatement with regard to those whose rights are invaded ; but its effects are the same. An abatement is always an injury to the heir or devisee of one who died seised of an estate of inheritance, that is, to the heir of tenant in tail, or to the heir or devisee of tenant in fee-simple. But when he who has died seised of a freehold had therein only an estate for his own life, the person who succeeds him does not take the land as his heir, but by some other title ; therefore there can be no abatement. In the case of dower, for example, he who is to succeed on the death of the widow tenant in dower is not her heir, but the heir of her deceased husband. So on the death of tenant by curtesy, the heir of the wife succeeds ; and if a man has an estate for life by express grant

or agreement, at his death the possession must go either to him on whom the freehold has been settled in remainder ; or, if no such limitation has been made, it must revert to the donor or his heir. If in any of these cases, on the death of the tenant for life, a stranger enters on the land, and seises it before the rightful owner, he is called an *intruder*, and his unjust entry an *intrusion*. Intrusion, therefore, may be defined to be the unlawful entry of any one on the death of tenant for life, tenant in dower, or by the curtesy, to the prejudice of him who is entitled to the remainder or reversion in fee-simple, fee-tail, or for term of life. (b) This injury, as well as abatement, were more known in former times than the present.

3. *Disseisin* is a third mode of injury to a freehold, which, according to its strict and primary signification, is possible enough in speculation, and perhaps practicable at the present day: but principally exists in fiction of law for the sake of the remedy which that supposition affords in all cases of disputed titles.

Disseisin is any act by which the present possessor is extruded or thrust out from his possession ; as if a man should enter the house of another, and either turn out the owner, or shut the door against him, and hinder his entrance. The ancient law,

(b) F. N. B. 203. Co. Lit. 277. a.

always annexing the idea of force to disseisin, permitted the owner to do what had been done to him, to enter by force and drive out the disseisor ; and though afterwards forcible entries were prohibited by statute, yet if he could contrive peaceably to recover the possession of his land, he lawfully might. This power, however, of recovering possession simply by entry was confined to the lifetime of the disseisor ; for if the disseisor died seised, his heir obtained a title by descent which it was necessary to dispute by action at law.

4. *Discontinuance* is, according to Littleton, an injury of the following description. Where the person in possession has aliened the land and dies, and a third person has at his death a right to those lands or tenements, but is by such alienation barred of his right of entry, and is obliged to bring an action for the recovery of them. (c)

In Littleton's time this might have happened in three cases ; namely, by the alienation of an husband seised of an estate of inheritance in right of his wife, of an ecclesiastic seised in right of his church, or of tenant in tail. For each of these three cases those who were entitled to succeed were put to their action, when their right accrued. But in consequence of different statutes which have been passed (d) discontinuances in the first two

(c) Litt. sect. 592.

stat. 1 Eliz. c. 19. and stat. 13

(d) Stat. 32 Hen. VIII. c. 28. Eliz. c. 10.

cases are impossible ; and the only possible case of discontinuance which now remains is that of tenant in tail. This happens when he who is in possession of an estate tail sells the land, or makes a conveyance of it, for a longer term than his own life by any of those means, which technically speaking are capable of creating a wrongful title in the grantee. Such are feoffments with livery, and releases with warranty. (*e*) The efficacy and solem-

(*e*) In former notes it has been observed that such a conveyance as that by lease and release cannot work a wrong, because nothing passes by it but what the grantor may legally grant. The same observation applies to the conveyance by bargain and sale. If a tenant in tail attempt to convey a fee by either of these conveyances, the grantee will indeed have a fee, because the tenant in tail has the inheritance in him : but it is a fee determinable either by the entry of the issue in tail after the death of the grantor, or it is absolutely determined by the death of the grantor without issue. A grant at common law is of the same nature. It consequently does not create a discontinuance when made of things lying in grant.

The conveyances which create discontinuances are feoffments with livery, fines at common law,

and releases with warranty. These conveyances are of so solemn a nature, that the law will not permit the presumption of falsehood to be raised against their apparent purport and effect. The fine which has been mentioned is the fine at common law, that is, without proclamations. For by stat. 32 Hen. VIII. c. 36. a fine with proclamations is an effectual bar to the issue in tail, and does not disturb remainders or reversions.

Conveyances with warranty are not very usual at the present day, in consequence of the disuse of real actions : but since the knowledge of the doctrine of warranty tends materially to elucidate many parts of our law, it may be useful shortly to inquire into its nature and consequences. Warranty, from the Saxon *war*, plainly imports some kind of defence ; and properly by arms,

nity of these conveyances is such that the law will presume that every thing is rightly done till the contrary be shewn. In these cases the estate tail is

as anciently was the practice in trial by battle. An obligation of this kind was anciently implied in the doing of homage : for as homage bound the tenant to the most solemn obligation of fidelity and adherence to the lord, so it imposed a reciprocal obligation on the lord to defend and protect the tenant; and after it was performed it also rebutted any collateral title which the lord might have to the land; and hence arose the maxim *quod homagium repellit perquisitum*. So before the statute *Quia emptores*, if lands were granted in fee by the word "*dedi*" to be held of the grantor himself, by this, without any further words, the feoffor and his heirs were bound to warranty. The warranty in this case as in the former was a consequence of tenure; and so necessary a consequence, that where an express and qualified warranty was introduced, it did not restrain or circumscribe the implied warranty. After the statute *Quia emptores* there could be no grant in fee simple to hold of the grantor; therefore there could be no implied warranty to bind the heir on such grants: but

there was always a personal warranty from the grantor as a consequence of the gift, although it did not apply to the heir. Afterwards in the case of grants in fee tail and for life, the tenure remaining between the donor and donee, the warranty remained as before the statute; and bound the heirs of the feoffor by force of the word "*dedi*," without naming them.

Express warranties were then introduced; to which the word *warrantizo* was essential, and which did not bind heirs unless they were named. In all cases however where warranties bound heirs, they were binding without assets, whether the heir claimed the estate by descent or by purchase. If he claimed by descent, it is obvious that no recompence was necessary, since it was an early maxim of our law that *hæres est pars antecessoris*, and that it was an essential quality of estates in fee simple to be unconditionally alienable. Therefore as far as the title of the heir himself was concerned, it could never be deemed inequitable that the warranty should rebut his title without assets. Indeed with



said to be discontinued. The succession is intermitted ; at least during the time intervening between the death of the alienor and the resti-

respect to those claiming by descent, warranty could be necessary only to rebut the title of that person *qui proximus erat in successione collateralis*, when the alienation was made, for neither the feudal law nor our own at any time regarded the claim of the immediate descendant. See *ante*, Ch. Of fee tail, *sub initio*. To those who, though heirs general of the warrantor, claimed a collateral title to the estate, it may seem to have been a greater hardship : but the law has always had a laudable anxiety to quiet men's possessions, and therefore the courts held that if such heir claiming collaterally made no complaint during the life of the warrantor, he must be taken to have forborne doing so, from the expectation of a recompence ; and after his death they did not permit any evidence to rebut the presumption of his having received such a recompence. Warranty is sometimes said to be a covenant real, whereby the warrantor binds himself and his heirs to yield in case of eviction other lands equal in value to the lands lost ; but it is difficult to conceive that this could have

extended to heirs in any case unless some actual recompence descended from the warranting ancestor.

After the statute *de donis* arose the distinction between lineal and collateral warranty. If an estate was given to one in tail with remainder to a person who might eventually be the right heir of the first taker, and the first taker aliened with warranty, this warranty was lineal with respect to the issue in tail, because he claimed by descent ; but collateral with respect to the remainderman, because he claimed by purchase. In the latter case it bound the heir without assets ; but in the former case it had no effect, unless assets descended from the warranting ancestor in lieu of the estate. The reason of this distinction it is scarcely possible at this day to assign. Warranties before the statute *de donis* were binding on the heir without assets, whether he claimed lineally or collaterally : but perhaps it was thought that it would be too open a violation of that statute to allow them to have that effect as to the

tution of the land to the right owner by operation of law.

Such an alienation therefore is voidable by the issue in tail, and those in remainder and reversion: but all unlawful conveyances by those who have a less estate than an estate of inheritance are absolutely void against those who succeed, and therefore do not oblige any one to apply to the law for redress.

5. *Deforcement* is a word of general signification, and is applicable whenever the right owner is kept out of his possession by force. It is used therefore as a supplemental term to signify any exclusion from a right of freehold which is not reducible to any of the former heads. Thus if one coparcener or tenant in common seises the whole tenement and excludes the rest, this is a deforcement. Many other cases might be stated (*f*): but

issue in tail after its enactment. C. B. Gilbert imagines that the statute of Gloucester, (6 Ed. I.) afforded the judges a principle upon which they established this distinction. By that statute it had been enacted that the tenant by the curtesy should not by his deed with warranty bar the heir of land descended from his mother further than assets descended from the father. This therefore might have afforded

some analogy in the case of issue in tail, but none as to the remainderman; and as the remainderman was not the immediate object of the statute *de donis*, collateral warranty remained as before a bar without assets.—  
EDITOR.

(*f*) The following examples of deforcement are taken from Blackstone's Com. Vol. III. p. 173. Where a lord has a seignory and lands escheat to him, but the

it is sufficient to observe that all exclusion from a right of freehold, which neither drives out an actual possessor, nor interrupts the course of succession, nor obstructs the operation of a will, is a *deforcement*.

It is now necessary to consider by what means the owner excluded from his estate may recover his right.

### 1. If he be injured by abatement, intrusion, or

seisin of the lands is withheld from him; here the injury is not abatement, for the right vests not in the lord as heir or devisee: nor is it intrusion, for it vests not in him that has the remainder or reversion; nor does it bear the nature of any discontinuance: but being none of these, it is therefore a *deforcement*.

So if a man marries a woman, and during the coverture is seised of lands and aliens and dies; is disseised and dies; or dies in possession: and the alienee disseisor or heir enters on the tenements and does not assign the widow her dower, this is a *deforcement* to the widow by withholding lands to which she has a right.

In like manner if a man lease

years, or for the life of a third person, and the term expires by surrender, effluxion of time, or the death of *cestuique vie*, and the lessee or any stranger, who was in possession at the expiration of the lease, holds over, and refuses to deliver the possession to him in remainder or reversion, this is a *deforcement*.

*Deforcement* may also be grounded on the non-performance of a covenant real; as if a man seised of lands covenants to convey them to another, and neglects or refuses so to do, but continues in possession against him, this possession being wrongful is a *deforcement*; whence in levying a fine of lands the person against whom the fictitious action is brought upon a supposed breach of covenant is called a *deforciant*.—EDITOR.

disseisin, he may make his claim ; or, if he can, may obtain possession by actual entry. The effect, however, of entry can seldom be an actual recovery of an usurped tenement, because he that has seised it can seldom be supposed to want some claim specious enough to admit of a contest. Entry, therefore, and the legal possession which it gives, is only a security against all pretences arising from a certain length of undisturbed occupancy ; and yet it enables him who has made such actual claim to act in many cases as complete owner : for instance, he may sell, lease, or bequeath the land, as if no other occupant were upon it.

When the domestic polity of the nation was imperfect, entries were made by force. Men took the liberty of doing themselves justice, and regained by violence what by violence was withheld. This was soon discovered to be contrary to good order, both because the use of government is that wrong may be remedied by authority rather than force, and because force might not always be on the side of right. It was therefore enacted by stat. 5 Rich. II. stat. 1. c. 8. that none should enter into lands but when the entry was legal ; and then in a peaceable manner, and not with a strong hand or a multitude. This law was confirmed and extended by stat. 8 Hen. VI. c. 9. and stat. 21 Jac. I. c. 15.

If the owner be by force or menaces hindered from actual entry on the tenement, he ought to

come as near as he can, and make claim before witnesses. This claim has for a year and a day the effect of entry; and if it be renewed annually it confers all the advantages which are derived from entry, and is called *continual claim* (g).

The right of entry must be exerted during the life of the abator, intruder, or disseisor; for it is tolled, that is, taken away by descent. The inheritor of an estate, in whatever manner it may originally have been acquired, has a good title so far as respects his ancestor, and therefore is entitled to this protection; because a continuance of possession affords a presumption of right; and he who has been suffered to die seised of an estate may reasonably be presumed by his heir to have been rightly seised. The heir therefore may be supposed to act without the consciousness of injustice, and the right owner consequently is driven to make good his claim by the proper action (h).

2. Of the several remedial actions transmitted to us from former times, by which the usurped pos-

(g) Litt. sect. 414—443.

(h) Litt. sect. 385—413. By stat. 32 Hen. VIII. c. 33. no descent can toll entry, unless the disseisor had peaceable possession for five years next after the disseisin. On the other hand it is enacted by stat. 21 Jam. I. c. 16. that no entry shall be made by

any man, unless within twenty years after his title shall accrue. And by stat. 4 and 5 Ann. c. 10. no entry shall be of force to satisfy that statute, or to avoid a fine, unless an action be therefore commenced within one year after, and prosecuted with effect.—  
EDITOR.

session of a freehold may be recovered to the right owner, the first is a writ of entry. This writ is applicable to all cases of ouster and dispossession of a freehold, except discontinuance and some kinds of deforcement. (*i*)

The proceeding however by writ of entry being extremely slow, a second legal remedy was resorted to, which was not subject to so much delay. This was the writ of assise, which is said by Horne, the author of the Mirror (*k*), to have been invented by Glanville, C. J. to Henry the Second: but it should rather have been said to have been borrowed from the Norman lawyers, among whom it appears to have had its rise (*l*). The word "*assisa*" signifies originally the jury that sit together on a cause: but is sometimes taken for the jurisdiction or commission by which they are summoned. In the present case it means the writ by which the sheriff is required to call them together (*m*). A writ of entry disproves the claim of the usurper, a writ of assise proves the right of the claimant: but the effect of both is much the same.

This remedy by assise is only applicable to two

(*i*) Such is that of deforcement of dower, for which the widow has her writ of dower, *unde nihil habet*. F. N. B. 147.—EDITOR.

(*k*) Mirror, c. 2. s. 25.

(*l*) Gr. Custom. c. 16. Spelm.

voc. *Assisa*. Gilb. Ten. 43. 33. Quære the age of the *Customier*, See Hale's Hist. C. L. ch. 7. p. 144.

(*m*) Litt. Sect. 234.

species of ouster, namely, abatement, and what in law-French is called *novel disseisin*, that is, an ouster recently committed. In the former case it is called an assise of *mort d'ancestor*, in the latter of *novel disseisin* (n).

But it is necessary that these writs for the recovery of the possession be brought within a certain and limited time ; for the peace of society requires that there should be a period from which succession should be certain, and property secure. The period was not easily determined. The first limitations seem to have been intended only as experiments or temporary expedients ; for they were such as could not be long of use. The first limitation prescribed by Henry the Second was, to time past since his return into England ; which was but the year before. *A tempore quo dominus rex venit in Angliam proximè post pacem factam inter ipsum et regem filium suum* (o). And the limitations by the Statute of Merton (20 Hen. III. c. 8.) and the Statute Westminster the First (3 Edw. I. c. 39.) were, the one from the return of King John from Ireland, the other from the coronation of Henry the Third. In time these limitations grew useless ; and therefore the stat. 32 Hen. VIII. c. 2. was made, which prescribed that whoever claimed lands by assise or writ of entry, as possessed by his ancestor, should claim within fifty years after the

(n) F. N. B. 221, per Hale.

(o) See Hale's History of the Common Law, c. 7. p. 143.

supposed disseisin, and whoever claimed upon his own possession should claim within thirty years.

These remedies, however, although they may restore possession, do not always establish right; for it may so happen that one man may have the legal right to the present possession, and another the right of property, for the recovery of which one great instrument is a writ of right.

The writ of right, which is considered as the highest writ known to the law, can be brought only by the claimant in fee simple. It may be brought concurrently with other real actions, such as assize or writ of entry; or it may be brought after other actions of an inferior nature are defeated. It has not however been a very common action for some centuries, because the possessory actions before-mentioned afforded an easier remedy; and now a still more expeditious trial is afforded by an action of ejectment, of which we shall presently speak. But if those actions are precluded by length of time, or have produced erroneous conclusions, redress may still be had from the powerful operation of a writ of right. Upon this writ, when issue is joined, the determination is final and irreversible. So necessary, however, has it been found to secure the peace of society by limiting the time of claim, that even a writ of right must, by the before-mentioned statute of the 32 Hen. VIII., be sued within sixty years from the time the right accrued.



In the case of discontinuances the right of possession is in the alienee ; and the right of property alone remains in the issue in tail, remainderman, or reversioner. But these persons cannot have the writ of right, because the injury complained of was not in respect of an estate in fee simple. The remedy provided for them by the statute *de donis* is by action of *formedon*, which is in the nature of a writ of right. The name of *formedon* is adopted because the action seeks to restore the succession according to the intention and purport of the gift, *secundum formam doni*. It is called a *formedon in descender, remainder, or reverter*, according as it is brought by the issue in tail, remainderman, or reversioner. The time of limitation to this action is fixed by the stat. 21 Jam. I. c. 16. to twenty years.

Having thus examined all the injuries to a right of freehold, which amount to an ouster or dispossession of the freeholder, with the principal real actions devised by our ancestors, as their respective remedies, we now proceed to consider the ouster and dispossession of him whose interest in the land is less than an estate for life. This the ancient lawyers were not so solicitous to divide into several species : but considered it only as the injury might be done to a tenant for years, a tenant by statute or *elegit*, and a guardian in chivalry, whose right of wardship was a chattel real.

Guardianship in chivalry being now abolished,

the rights of chattels which may be thus violated, are confined to leases for years and estates by statute merchant, statute staple, or *elegit*.

I. The ouster of a tenant for years is effected by any act, which deprives him of that possession to which he is entitled by virtue of his lease. A lessee for years thus ousted has two remedies provided by the law for different cases. First, a writ of *ejectione firmæ*, commonly called an action of ejectment, which may be brought against the wrongdoer who has got possession of the estate. Secondly, a writ of *quare ejecit infra terminum*, which may be used where he who has got possession did not himself dispossess the farmer, but has received it from one who did.

The action of ejectment, or *ejectione firmæ*, is now become the common method of trying the title to lands and tenements, not only where the plaintiff claims an estate for years, but also where he claims an estate for life, or even in fee. It may therefore be proper to inquire how it became so, and what is its general nature.

By the common law, as it was anciently understood, no right to lands and tenements could be otherwise tried, than by some real action, the end of which was to determine who was entitled to the present possession. A lessee for years was considered as one who possessed the land *nomine alieno*;

one who was little more than the bailiff or agent of the owner of the freehold, in whom the law vested the possession of the soil. The tenant for years, therefore, if unlawfully ejected, was not only incapable of suing a writ of right, as not having any title to the fee simple; but even of bringing an assize, or other possessory action, as not having legally and on his own account the possession. The lease being considered as a private contract between the lessor and the lessee, if the lessor ejected him, he might by a writ of covenant both recover damages, and oblige his landlord to fulfil his agreement, by restoring him to his term: but if the lessor suffered a recovery of the freehold, the lessee was defeated of his term, and could only recover damages from his lessor by action of covenant. In later times a particular act (stat. 21 Hen. VIII. c. 15.) was made to enable him to falsify untrue and collusive recoveries suffered by his lessor for the purpose of defrauding him of his term.

If the lessee was ejected by a stranger without the concurrence of the lessor, he could then only recover damages against the wrongdoer by this action of *ejectione firmæ*: but had no redress to recover his term. And the lessor, who was owner of the freehold, might or might not at his pleasure bring an assize against the ejector to recover possession of his estate. Afterwards, when the interest of a lessee for years began to be more re-

spected, a practice was introduced into the Courts of subjoining to the judgment, whereby the plaintiff in an action of ejectment recovered damages for the injury, a writ of *habere facias possessionem*, whereby the sheriff was directed to restore him to the possession of his farm. (*p*)

From that time the action of ejectment became in effect a kind of possessory suit ; and therefore from that time it was possible for any one who was dispossessed even of a right of freehold to try his title to it by this action, which accordingly it became usual to do in the following manner. He who was disseised, or feigned himself to be so, made an entry upon the land, (as by law he might) and being thereby legally in possession, executed a lease to some person, who thereby became tenant for years. If, after this, either the tenant before in possession exercised any act of ownership, or if any other person entered upon the land *animo possidendi*, this might reasonably be considered as a dispossession of the actual tenant, for which he might bring an action of ejectment to recover the land according to his lease. It was therefore contrived that such third person should come upon the land, and dispossess the tenant of the disseisee : the tenant brought an action against the wrongdoer, and prevailed ; and consequentially obtained a writ directed to the sheriff to put him in possession. But as by this method the tenant of the disseisee or

his lessor might collusively obtain judgment against the supposed wrongdoer, who is called the casual ejector, and thereby recover the land, while the tenant really in possession, and who perhaps had a legal claim to the possession, knew nothing of what passed till the sheriff's officers came to turn him out, a rule was therefore very equitably established by the Courts that no lessor of a plaintiff should proceed in ejectment to recover his lands against the casual ejector, without delivering to the tenant really in possession a copy of the declaration, and allowing him to become defendant instead of the nominal defendant.

Thus the practice continued till the time of James I., when Lord C. J. Rolle introduced another improvement into this method of trying the title. For as the execution of the lease upon the land, the entry of the lessee in consequence thereof, and the dispossession or ouster of the lessee by the casual ejector, were now become merely forms, it was considered that much trouble might be saved to the lessor of the plaintiff if these forms could be avoided altogether without violation of legal order. It was therefore made a rule of the Court of King's Bench, which has since been adopted in the other Courts, that when the tenant in possession applies to the Court for leave to become defendant instead of the casual ejector, his request shall be granted, only upon condition that he will confess lease, entry, and ouster, and rely upon his

title merely ; that is, he will not put the plaintiff to the trouble of proving that his lessor entered on the land and granted him a lease, and that the plaintiff in consequence of that lease entered and was ousted ; but will rely solely on the merits of his cause, and the right that he has to enjoy the land.(q)

The writ of *quare ejecit infra terminum* was chiefly in use where a landlord before the expiration of his tenant's lease entered upon the land and conveyed the freehold to some other person. Here the ejected tenant could not bring an action of *ejectione firmæ* against the new owner of the freehold, because he had not actually ejected him : but since entry and ouster are become mere legal fictions, the action of *ejectione firmæ* is the common one in this case as in others.

Tenants by statute merchant, statute staple, and elegit, have by the several statutes which permitted such estates to be created the remedy by assise expressly assigned to them in case they are dispossessed. But in these as in almost all other cases an ejectment is now usual.

(a) By a recent rule of the Court of K. B. and C. B. the defendant must also state in respect of what premises he intends to defend, for before that much injustice was committed by throwing the burthen on the plaintiff of proving the tenant in possession of the premises described in

the declaration, and the plaintiff failing to do so was frequently nonsuited. This difficulty, therefore, being removed, there is now no obstacle remaining to the trial of title on its own merits. 4 B. and A. 196. 2 Brod. and B. 470.—EDITOR.

## CHAPTER X.

OF JUDICIAL EQUITY WITH REFERENCE TO REAL  
PROPERTY.

The two Courts in which equity is dispensed amongst us are the Chancery and the Exchequer. After William the Conqueror had established the feudal polity, of which the Saxon constitution only comprised some imperfect rudiments, the whole realm of England was considered as one great seignory or dominion, of which the king was the chief lord, and the barons who held their lands immediately of him were the peers or fellow judges of his great Court ; in like manner as in every inferior lordship the free tenants of the manor or honour were *pares curiæ*, the judges of their lord's court baron. But as it never could be thought fit that this great council, which was at the same time a legislative assembly and a supreme Court of justice, should be called together to redress every petty injury, and punish every petty crime ; for the discussion of those causes which were not of such importance as to be laid in the first instance before the peers of the realm, and which yet for various reasons were not left to the

decision of inferior and local judges, a Court was instituted soon after the Conquest in the royal palace, consisting of the great justiciary and other officers of state and of the household; which afterwards was divided into the several Courts now subsisting in Westminster Hall.

The same great officers, who, as composing this supreme Court called *Curia Regis*, were entitled *Barones Regis*, when they sat in the Exchequer to superintend and take an account of the royal revenue were generally stiled *Barones Scaccarii*. (*a*) Afterwards when the office of the Chancellor of the Exchequer was erected, and barons were specially appointed to assist him and the treasurer in the management of the revenue, the place of such baron was frequently filled by a bishop; (*b*) for in conformity to the original institution it was fit he should be a baron of the realm; and in those days of ignorance the spiritual lords were the only lords of parliament who could undertake employments, which required any degree of literature.

The Chancellor of England was constantly an ecclesiastic, being chief chaplain to the king and keeper of his conscience; in which character it was his original office to supervise and seal all writs and precepts issuing in the king's name as well as

(*a*) *Mad. Hist. of the Exchequer*, Vol. I. page 199, 4to.

(*b*) *Mad. Exch. Vol. II. 27.*



all royal charters, which likewise he had the transcendent power of cancelling when contrary to law or good conscience. (c)

The king being bound by his coronation oath to administer justice in mercy, has been allowed, as long as that oath and the constitution of our monarchy has subsisted, to have a power of mitigating the rigour of law, and of supplying in peculiar cases its defects. It was therefore very anciently usual to petition him personally, not only for pardon of offences in mitigation of the severity of criminal justice, but for redress likewise of such civil injuries as were supposed to be incapable of relief according to the strict rules of law and the established forms of legal process. These petitions it was natural for the king to refer in some cases to his privy council, which gave rise to the Court of requests long since abolished; in others to his Chancellor, who was in most instances by abilities as well as station the fittest to perform this trust; and in those cases which concerned the king's debtors or accountants, he referred them to the Lord Treasurer, the Chancellor, and the Barons of the Exchequer. To this practice most writers

(c) Hickes' Diss. Epist. 47, 48. Mad. Hist. Exch. Vol. I. 60, 61. 4 Inst. 88. But it may be observed that the term *cancelling* seems to be derived from the name of the office, and not the

name of the office from the duty attached to it. See Gessner's *Thes. voc. Cancellarius*. Gibb. *Decline and Fall of the Roman Empire*, 2 vol. 99. note.—EDITOR.

refer the origin of the equitable jurisdiction which still subsists in the Chancery and the Exchequer ; and in which the form of proceeding is borrowed from the Ecclesiastical Courts, because the judges were for the most part ecclesiastics.

To explain the difference between law and equity, and to enumerate all the occasions in which equity is in a well regulated state to prevail over law, or in which law is to operate without mitigation or exception, is very difficult, “ *Omnis definitio in jure civili periculosa est,*” say the Roman lawyers ; (d) and there is perhaps no question in which definition is less practicable than when law and equity require to be contradistinguished. It is indeed to this difficulty that judicial equity owes its existence ; for if all cases in which law requires the interposition of equity could be defined, they could have been foreseen ; and if they could have been foreseen, the law would have been framed with such enumeration of particulars as might have comprehended them. Aristotle however, whose definition has been adopted by Grotius, Puffendorf, and other modern writers, ventures to define equity, and calls it “ the correction of law, where by its universality it is deficient ;” *επανορθωμα νομου, η ελλειπει δια το καθολου.* (e)

(d) Dig. lib. 50. tit. 17. leg. 202.

(e) Arist. Eth. ad Nicom. lib. 5. c. 10. : and with the same mean-

ing, but not so distinctly, he says in his Rhetoric, lib. 1. c. 13.

εσι δε επεικειες, το παρα γε-  
γραμμενον νομον δικαιον.

Every kind of human action has its rules, and all those rules have their exceptions. The shortest passage from place to place is by a right line; yet roads are often winding to avoid some greater inconvenience than that of length. It is easier to go round a hill than to scale a precipice. It is safer to turn aside to a ford than to swim a river. Cumberland has observed (*f*) that right as opposed to wrong is a metaphorical expression derived from geometry, in which *right* is opposed to *curve*; and that as the shortest way between two physical points is a right line, so that is a right action by which a moral end is most easily attained. Law may be considered as the right line of morality and polity, from which the subject is never to depart but by permission of the magistrate; and which the magistrate is never to forsake, but when some insurmountable obstructions compel, and therefore justify, the deviation.

The end of all law is to give to every man that which he may justly claim, *suum cuique tribuere*; and the design of all juridical maxims and institutions is to adjust and satisfy the various degrees of right which may arise in the devolutions of succession, the reciprocations of contracts, the terms or conditions of credit and of partnerships, and the various combinations of accident or commerce. These combinations, being indefinitely variable

(*f*) De Legibus Naturæ, c. 5.

and increasing every day as new schemes of action produce new relations among men, could never have been all foreseen by any legislator, and therefore could not have been all comprehended in any system of law. It will therefore happen sometimes that those rules which were made to secure right would, if they were closely observed, establish wrong, because they would operate in a manner not foreseen when they were made. Upon these occasions the aid of equity is solicited not properly to controul or supersede the law, but so to regulate its operation, that it may produce the effect which the law always intends. The decisions of equity as contradistinguished from those of law are not *contra legem*, but *præter legem*: they do nothing which the law forbids; they do only what the law desires, but cannot perform.

But although equity supplies the deficiencies of law, it cannot correct the errors of the legislator. Where the will of the lawgiver is known, it must be obeyed at whatever hazard, and with whatever inconvenience. In cases which the legislator did not foresee, equity endeavours to do what he would have done, if the question had been before him: but in cases for which the law is apparently and expressly made, whoever may be oppressed, equity can give no relief. "It may be a doubt," says Grotius in his little treatise *De Æquitate*, "whether a law be equitable or not: but there can be no doubt whether it ought to be obeyed." It is with respect

to law, as to a testament; for he that makes a will is a lawgiver with respect to the disposition of those possessions which are in his power. If a will be obscure, the chancellor may explain it; and he will explain it according to equity, because he will suppose the testator meant to do right. But if a will be unequal or unkind, and it appears that such inequality or unkindness was intended by the testator, the Chancellor cannot redress it; for though the will be inequitable, it is equitable that men should make wills at their own discretion.

Various are the causes which for the last 150 years have continually augmented the business of Courts of equity. Laws made and forms of process established in remote times, and referred to a constitution of life very different from the present, have grown every day less commodious and less practicable. As men have been more enlightened by knowledge, and more animated by liberty, they have discovered inconveniences which passed unobserved in darker times. The great increase of traffic and commercial property has multiplied those rights which are liable to secret frauds; and the disuse of those simple and notorious modes of conveyances which were borrowed from the feudal law, together with the introduction of numerous provisional clauses in modern family settlements, has involved in obscurity the titles to half the estates in the kingdom. It is therefore frequently necessary, and still more frequently expedient, to have (what

cannot be had in a court of law) the answer of a defendant upon oath either for the sake of an account, or of some expected discovery. For these reasons, and perhaps for a thousand others, the business of the Court of Chancery has perpetually increased; and so much has the public been satisfied with its process and decisions, that its operations are now no longer confined to cases in which the common law can give no remedy, but are extended to many important cases in which it is permitted to exercise a concurrent jurisdiction from some accidental advantages attending its constitution.

The jurisdiction however which prevails in our Courts of equity is not, as some have imagined, a vague and uncertain termination of disputes according to the present opinion of the existing judge; an arbitrary and extemporaneous declaration, without settled principles or fundamental rules. The equity of our Courts is the result of experience reduced to axioms; a settled and well compacted system, which has grown up gradually out of innumerable cases, and is confirmed by a long series of decisions diligently reported. It may very properly be enquired how equity so dispensed can be distinguished from law. The true answer perhaps is, that if law be taken, in the general and scientific sense, for a known and settled rule of judicial determination, the maxims of the Court of Chancery make one species of law. But if law be understood, in the current and technical accepta-

tion, to mean only the prescriptions of immemorial custom, and the positive decrees and statutes of Parliament, equity differs from it as having its original not in custom but in reason; not in positive statutes but in the decision of the courts; and as being therefore subject to new modifications if other combinations of property should arise, or experience should shew the inconvenience of the rules which now prevail.

A general view of the effect of this great and important jurisdiction on real property may be obtained by investigating and explaining the distribution of justice in Courts of equity under the following heads.

1. In cases of securities for money lent.
2. In cases of contracts.
3. In cases of qualified property, or property affected with trusts.

1. Equity will interpose to prevent or remedy oppression on the one hand and fraud on the other, and to effectuate the intentions both of the lender and borrower as far as their intentions are consistent with law and justice.

Securities for money are either such as directly and immediately encumber the land of the borrower with the debt; or such as only affect it conse-

quentially, when the debtor has by a solemn engagement bound himself and his heirs, and consequently his inheritable property.

The direct and immediate incumbrances are mortgages, estates by statute merchant and statute staple, and estates by *elegit*: the nature of which was generally explained when we considered estates upon condition.

The securities which only collaterally or by consequence affect real property are bonds, and other contracts under seal; the form and design of which it may be proper briefly to explain.

A bond, bill, or obligation in the largest sense, is a writing under seal, whereby the obligor or person who makes it binds himself, his heirs, executors, and administrators, to pay a certain sum of money to the obligee, his executors, administrators, or assigns. Of this the most simple, and as it seems the most ancient form, is as follows:—"I, A. B., do owe unto C. D. the sum of        pounds of lawful money, for the payment whereof I bind myself and my heirs. In witness whereof I have hereunto put my hand and seal this        day of        in the year of our Lord        ." (g) This is called a single bond or bill, *obligatio simplex*; (h) and such was the original obligation, a simple acknowledg-

(g) West's Symboleography, (h) Co. Litt. 172.  
Part I. book II. sect. 101.



ment of the sum due without interest and without penalty ; which was perhaps sufficient in times of little commerce, when all interest or profit on loans was considered by the clergy, as usurious and contrary to good conscience. But when by the general diffusion of trade money might be used by almost every hand through which it passed with advantage, it will be easily imagined that few could be prevailed upon to lend without participating in the profits which such loans insured to the borrowers. Our law, however, retained yet so much of its feudal dignity, was so little acquainted with the principles of trade, and complied so entirely with the doctrines then taught by the church, that it considered as wicked and usurious all increase of the sum lent by one man to another. General convenience, however, will always find some way to attain its ends ; and therefore when those who had money to lend could not legally stipulate for interest, they found a method of making the payment of interest a matter of election to the borrower. When they lent, for example, 100*l.* they made the borrower confess a debt of 200*l.* ; and annexed a condition, sometimes indorsed, but now generally subscribed at the bottom of the bond, according to which the debt of 200*l.* was to be discharged on the payment of 100*l.* and interest. If this bond be taken literally, as the law then made a semblance of taking it, the payment of the conditional sum with interest was not oppression but lenity, being not an increase but a mitigation

of the debt expressed in the obligation. But while the bond was considered as intending what was literally expressed, the law necessarily compelled him who failed in the condition to pay the sum expressed in the precedent obligation. Of such forfeitures the hardship could not fail to be quickly discovered; and those who suffered without redress from law were necessarily driven into Courts of equity, where judges not restrained by legal forms and legal rules very readily decreed, that if the lender had his full profits, he ought to be satisfied; and in such satisfaction they compelled him to acquiesce. These causes were confined to Courts of equity till the universal conviction of the reasonableness of their decisions produced an act of parliament, stat. 4 Ann. c. 16. by which the power of relieving against the penalty was communicated to the Courts of law.

A mortgage is a real security exactly analogous to the penalty of a bond. The land was forfeited at law upon the same principle, and was upon the same principle restored by equity. The power of relieving in this case likewise is, as I have formerly shewn, now given to the Courts of law by stat. 7 Geo. II. c. 20.

These acts, however, though they extended the power of the Courts of law, did not take away the jurisdiction of the Courts of equity, which may still do that justice which the Courts of law have a con-

current not an exclusive authority to distribute. Many cases may also happen in which either the Courts of equity alone can grant relief, or in which they can relieve the complaint more effectually than Courts of law ; of which it will be proper to give some examples.

Courts of equity will not consider a bond, or even a bond and judgment obtained at law, as sufficient evidence of the reality of the debt ; for bonds are sometimes obtained by importunity and persuasion, sometimes by fraud, and sometimes extorted by necessity or fear. In these cases equity will relieve upon payment of whatever shall be proved to have been actually lent with interest. (*i*)

In claims of debt equality is equity : but equity being equal, priority by law shall be allowed to prevail. If an owner of land mortgages it to A, and afterwards mortgages it to B. without giving him notice that any prior incumbrance is subsisting, but B. upon discovery of this purchases of another creditor a mortgage, statute merchant, or other legal security on the same estate, precedent to that of A., and thereby obtains a right to the legal possession of the land, a Court of equity will permit him to insist on re-payment not only of what he paid for such precedent security, but likewise of the principal and interest due on his own

(*i*) *Waller v. Dalt*, 1 Ch. Ca. *sommer*, 1 Bro. Ch. 149. E. 276. See also *Barker v. Van-*

original mortgage, before he resigns the pledge to the claim of A. ; because, though A.'s mortgage is prior in time, yet since the debts are all equal in conscience, a Court of equity will not compel him to part with that advantage which the law gives him as purchaser of the antecedent incumbrance (*k*).

It is an invariable rule that he who solicits the relief of equity must do on his part what equity requires. Therefore, where A. mortgaged an estate to B., and afterward borrowed from B. another sum upon bond ; it was decreed that he should not be allowed to redeem the mortgage without likewise paying the other sum (*l*). And this obligation is likewise thrown upon the heir when included in the bond, if he wishes to redeem the mortgage after the death of the obligor (*m*).

Courts of equity will not suffer the general right of redeeming a mortgage to be defeated by any positive and particular restrictions or limitations. If therefore a mortgage be made upon condition that no one shall redeem but the mortgagor himself, or the heirs of his body, yet if the mortgagor die without heirs of his body, equity will allow the land to be redeemed by the heir general ; for the land was but a pledge for so much money, and it

(*k*) 2 Ventr. 337, 338. Willoughby v. Willoughby, 1 T. R. 763.

244.

(*m*) Shuttleworth v. Laywick, 1 Vern. 245. See Coleman v.

(*l*) Baxter v. Manning, 1 Vern. Winch, 1 P. Wms. 777.

can make no difference to the lender by what hand the money is repaid. (n)

The great object of these Courts is universal justice. They are therefore generally influenced by two great principles. 1st, That in every case the substance, and not the accidents, is to be regarded; and, 2dly, That no right shall subsist to which the means of vindication shall not be afforded.

II. In the second place we are to consider the cases of contract in which a Court of equity will interfere.

A contract is an agreement between two persons, producing a mutual obligation. From this definition it follows that a contract is then truly and equitably performed when the intention of both the contracting parties is fulfilled. The law knows no other mode of enforcing a contract but by assigning damages equivalent to the injury produced by the violation. Equity therefore comes to the aid of law, and decrees the contract to be specifically performed. Thus, if a bargain be lawfully made for a house and garden, which before the transfer is complete the seller refuses to quit, the law can only assess damages by the assistance of a jury as a compensation to the buyer: but a Court of equity will compel the seller to put him in pos-

(n) *Howard v. Harris*, 1 Vern. 33. 190.

session of the particular house and garden for which the bargain was made, because he may have bought it for reasons which no pecuniary compensation can satisfy. But as equity should always be consistent with reason, it must be shewn that a specific performance has some real advantages: for where complete compensation can be made, the Court has no indulgence for obstinacy or caprice. (o) In contracts relating to real property, it is always assumed that no compensation in damages can be made for the violation of the contract: but the contrary presumption is made with respect to personal chattels, the loss being in general capable of the nicest estimation. Such contracts are therefore left to their fate at law. (d)

Equity interposes where any defect or informality is to be supplied. It is a rule in law that debts for which any special security is given, that is, any instrument under seal, shall be preferred to debts arising from simple contract, which are secured only by verbal promise, implied engagement, or writing unsealed. Debts by specialty are incumbrances on land; simple contract debts affect only the person of the debtor. But equity considers all just debts of equal obligation; and although it will not in opposition to law charge lands with debts by

(o) *Cud v. Rutter*, 1 P. Wms. 370.

*Bro. Ch. Ca. 341. Nutbrown v. Thornton*, 10 Ves. 155.

(p) *Errington v. Aynesley*, 2

simple contract, yet if they are devised to trustees for payment of the testator's debts, the Courts of equity will make no distinction, but will order debts of every kind to be discharged in the same proportion. (*q*)

In favour of purchasers equity will interpose as far as is consistent with the rules of law to obviate every objection arising from want of form. We have formerly seen that the word "purchase" in law is of very extensive signification, and includes every species of acquisition as contradistinguished from hereditary descent. But by the word "purchaser," in equity, is usually meant an honest buyer for a valuable consideration; one who *bonâ fide*, without fraud or surprise, by payment of a price acquires any right or interest. And such a purchaser a Court of equity will neither deprive of any legal advantage, nor compel to make a discovery that may weaken his title; but will on the other hand dispense with legal forms in his favour, and oblige others to render him effectual justice. If (*ex. gr.*) a man in consideration of an intended marriage settle a jointure on his intended wife, and make a provision for the issue of the marriage, the wife and children are purchasers for valuable consideration: and though the settlement be made after marriage, and consequently is void at law, because husband and wife can make no

contract with each other, yet if it be made in pursuance of articles made before marriage, it is valid in equity. (r)

Courts of equity will set aside a contract where any fraud, either positive or negative, has been used; where any pernicious falsehood has been affirmed, or any necessary truth suppressed. And they will sometimes (s) interpose where the conditions are manifestly and oppressively disproportionate, though no fraudulent act appears; for where the terms of a contract are in a great degree disproportionate, and that disproportion is made the subject of complaint, it is plain that if there was not fraud there was error; that something was done which was not intended, and the concurrent intention of both parties is necessary to the validity of a contract. It is the business of the magistrate to protect the weak against the strong, and the simple against the cunning. And therefore, as Puffendorf observes, “*Eousque in contractibus onerosis æqualitas est adhibenda, ut licet nihil dissimulatum sit, tamen si postea inæqualitas deprehendatur, etiam citra culpam contrahentium, ea corrigenda est.*” (t) It is however

(r) *Douglas v. Waad*, 1 Ch. 575.

Ca. 99. *Carpenter v. Carpenter*,  
1 Vern. 440. *Towers v. Davis*,  
1 Vern. 479. *Stephens v. Gaule*,  
2 Vern. 701.

(s) *Hick v. Phillips*, Prec. Ch.

(t) Puff. de Officio, lib. 1. c.  
15. sect. 4. But see *Gwynne v.*  
*Heaton*, 1 Bro. Ch. Ca. 9. *Mort-*  
*lock v. Buller*, 10 Ves. 292. The  
modern doctrine seems to be,



to be observed that the disproportion of a contract must be evident and enormous; for the Courts will not amend small errors, or adjust nice differences.

III. We come in the last place to consider that species of qualified property, which is generally known under the name of trust property.

The common meaning of trust is well known: it is a power given to one man of acting for another, with confident expectation that he will do what may best effect the purpose for which he is employed. Trust in law is the possession of property by one which is to be enjoyed by another. The beneficial interest in such cases was formerly called a use: but now it is called a trust estate. Our ancestors, though they could not leave their lands to any one by will, nor grant them even in their lives to any corporate body in mortmain, could yet, without any regard to the restraints of positive law, alien the perpetual profits at pleasure, by a disposition which being deemed obligatory in conscience was therefore enforced in Chancery. When afterwards, by the statute of uses (27 Hen. VIII. c. 10.) it was enacted, that “where any one should be seised to the use of another,

that where the consideration is grossly inadequate, and there are no circumstances of fraud, a Court of equity will assist neither

party: it will neither enforce performance nor rescind the contract. *Day v. Newman*, cited 10 Ves. J. 300.—EDITOR.

the persons entitled to the use should be deemed to be in possession of the land itself;" the ends for which uses were created could no longer be answered by them. An use being now in consideration of law the very possession of the lands conveyed, was consequently become only the mode or form of a legal estate, no longer protected by Courts of equity in opposition to Courts of law, but governed like the estate which was its substance by every legal rule. By this law therefore the property became again fixed and unchangeable: but the nation having been now long accustomed to a free use of the possession, grew impatient of that imperfect dominion over their estates which this act had revived; and general importunity procured in a few years the enactment of those laws by which the lands themselves were rendered subject to testamentary dispositions. They still however found themselves in want of many conveniences which the practice of creating uses had afforded. The various combinations of life made it then, as they make it now, necessary to give to one the power of acting for another; and uses were revived under the name of trusts, and revived with so much connivance from the Courts of law, that it is reasonable to suppose that the judges were by this time convinced of their convenience, and were willing to admit them by a rigorous adherence to the letter of the statute.

The act describes the person who holds for another by the term of "him that is seised of lands for another's use." This description was evaded by raising a term for years, that is, by giving the trustee possession for a limited number of years to a certain use ; for he is not in law said to be *seised* of lands who is not possessed of an estate of freehold therein.

Another way of evading the statute was more subtle and artificial. The Courts of law had determined that a use could not grow upon a use : upon that therefore which before the statute did not subsist the statute did not operate ; and in consequence of this doctrine it was now made the practice to grant lands to A. for the use of B., who should hold them in trust for C.

Again the statute mentions only the case of one man being seised to the use of *another*. Where therefore an estate was conveyed to A. to the use of himself, this was said not to be within the statute, but to be a use executed by the common law ; and indeed it is obvious that such a limitation could never have come under the cognizance of Chancery as a use before the statute, for it is nothing more than what the law must understand in all cases, that *primâ facie* the visible owner of the estate has a right to receive the profits. But after the statute it was held in favour of trusts, that if an estate was conveyed to A. to the use of himself

in trust for B., that the maxim that a use could not grow upon a use applied to this case as much as to any other.

The rule with respect to devises is not so strict as that relating to trusts raised by deed. For it appears that a devise to uses without a seisin to serve them is good; and where an estate is devised to one for the benefit of another, the Courts will execute the use in the first or second devisee according to the intention of the testator.

Trusts being thus established are of two kinds :-

1. Public ; and, 2. Private.

1. Public trusts respecting property chiefly relate to public charities, in the administration of which the Court of Chancery will interpose. But as this species of trust is more a matter of peculiar jurisdiction than a modification of property, it is not necessary to say in this place any thing more respecting it.

2. The end and nature of a private trust may be shewn by a familiar example. The estate of the wife becomes by marriage during her life the estate of the husband : but if the friends of the wife wish to give her any thing to her separate use, it must be by the intervention of a trustee ; and many other cases may be imagined

in which the same intervention may answer the most beneficial purposes. In all such cases the Court of Chancery exercises an absolute jurisdiction over the conscience of the trustee, for the benefit of the person entitled to the enjoyment of the property.

Equity does not regard the form and circumstances of an act, but the intention of the parties ; and therefore considers as owner of the estate not the trustee but the person entitled to the profits, who is usually although somewhat improperly called *cestui que trust* : so that if *cestui que trust* does any act or makes any legal conveyance or assurance, such as levying a fine, or suffering a recovery, it will have the same effect upon the trust estate (that is, on the equitable right to receive the profits,) as if it were an estate at law. (*u*)

Trust estates also will descend according to the rules of descent applicable to legal estates : but in a few instances equity has adopted different rules respecting them from those established by law respecting legal estates. For although a trust of inheritance is subject to curtesy, it is not to dower ; (*x*) an inconsistency which it seems to be agreed has arisen from motives of convenience, and not from principle.

(*u*) 1 Ch. Ca. 49. 68. 213. 2  
Ves. 655.

(*x*) 1 Ch. Rep. 254. Prec. in  
Ch. 336.

The acts of a trustee can never prejudice *cestui que* trust, unless with reference to a *bonâ fide* purchaser, without notice of the trust. The remedy of *cestui que* trust is in that case personal against the trustee for a breach of trust.



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## ERRATA.

Page 115. l. 16. for “*curiis*” read “*curiæ*.”

— 127. l. 10. *dele* “*are*.”

— 254. note, 2d column, l. 11. *after* “*between*” *insert* “*them*.”

— 263. — 1st column, l. 16. for “*perquisitium*” read “*perquisitum*.”









